DOCUMENT RESUME

ED 123 823 EC 090 014

TITLE Handicapped Persons: Nondiscrimination. Part V.
INSTITUTION Department of Health , Education, and Welfare, Washington., D.C. Office of the Secretary.
PUB DATE May 76
NOTE 87p.; Federal Register; Part V; v41 n96 p20296-379 May 17, 1976

EDRS PRICE MF-$0.83 HC-$4.67 Plus Postage.
DESCRIPTORS Architectural Barriers; *Cost Effectiveness; Employment; Equal Education; Exceptional Child Services; *Federal Legislation; *Handicapped Children; Health Services; Social Services
IDENTIFIERS Rehabilitation Act of 1973

ABSTRACT

Presented by the Department of Health, Education and Welfare are proposed rules regarding section 504 of the Rehabilitation Act of 1973, which prohibits discrimination in federal programs on the basis of handicap. Detailed are costs, benefits, and inflationary impact of implementing provisions related to the following areas (with sample subtopics in parentheses): employment practices (compensation and fringe benefits); program accessibility (existing facilities and new construction); preschool, elementary, and secondary education (free education and nonacademic services); higher education (admissions, housing, health and insurance); and health, welfare, and social services (education of institutionalized persons). (CL)

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ED123823

federal register

MONDAY, MAY 17, 1976

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PART V:

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office of the Secretary

■

HANDICAPPED PERSONS

Nondiscrimination

EC090014

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office of the Secretary

[45 CFR Part 84]

NONDISCRIMINATION ON THE BASIS OF HANDICAP

Programs and Activities Receiving or Benefiting from Federal Financial Assistance

On September 26, 1973, the Rehabilitation Act of 1973 became law. Section 504 of that Act reads as follows:

> No otherwise qualified handicapped individual in the United States, as defined in section 7(6), shall, solely by reason of his handicap be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

This section breaks new legislative ground in that it is the first major statutory civil rights enactment that protects the rights of handicapped persons. The language of section 504 is almost identical to the nondiscrimination provisions of section 601 of title VI of the Civil Rights Act of 1964 and section 901 of title IX of the Education Amendments of 1972 and, like those statutes, establishes a governmentwide policy against discrimination in federally assisted programs and activities—in this case on the basis of handicap.

Section 504, however, differs conceptually from both titles VI and IX. The premise of both title VI and title IX is that there are no inherent differences or inequalities between the general public and the persons protected by these statutes and, therefore, there should be no differential treatment in the administration of Federal programs. The concept of section 504, on the other hand, is far more complex. Handicapped persons may require different treatment in order to be afforded equal access to federally assisted programs and activities, and identical treatment may, in fact, constitute discrimination. The problem of establishing general rules as to when different treatment is prohibited or required is compounded by the diversity of existing handicaps and the differing degree to which particular persons may be affected. Thus, under section 504, questions arise as to when different treatment of handicapped persons should be considered improper and when it should be required.

Because the concepts underlying section 504 were new and complex and few judicial precedents existed in the area, the very general language of the statute creates serious problems of interpretation. There is almost no substantive legislative history surrounding the development and enactment of section 504. There were, for example, no public hearings accompanying the original bills, and there was almost no substantive floor debate. Only in December 1974, during passage of the Rehabilitation Act Amendments, did Congress attempt to clarify its intent in enacting section 504 and to articulate this intent in a manner which could be used by the Department as guidance in its efforts to administer the Act.

In particular, the 1974 amendments yielded a new definition of the term "handicapped person," the original definition having been so narrow as to exclude from coverage many persons intended to be protected.

As amended, the statute provides that, for the purpose of section 504, a handicapped individual is:

> any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment.

This new definition, which became law on December 7, 1974, makes it clear that section 504 was enacted to prevent discrimination against all handicapped individuals, regardless of their need for or ability to benefit from vocational rehabilitation services. Therefore, not only employable disabled persons, but also persons whose employability is nonexistent or marginal, such as persons with severe handicaps, are included within the protective reach of section 504.

There is no legislatively directed scheme of enforcement such as those provided in sections 602 of title VI of the Civil Rights Act of 1964 and 902 of title IX of the Educational Amendments of 1972. To fill the legislative void, Executive Order 11914 was issued which, among other things, supplies the directive for specific enforcement procedures and sanctions for noncompliance, all of which are based on precedents from these other statutes. In addition, it provides for a general enforcement scheme under which the Secretary of Health, Education, and Welfare is assigned responsibility to coordinate the Federal government's implementation of section 504. In the absence of legislative mandate as to the form of administration of section 504 and prior to the issuance of E.O. 11914, it fell to this Department, as a granting agency, to develop a means of assuring compliance with the prohibitions of the provision.

The most important problem which has hindered the development of the regulation is the constant need to weigh competing equities while resolving complex issues. Thus, while we recognize that the statute creates individual rights, the statute is ambiguous as to the specific scope of these rights. Implicit in this situation is the need to assess carefully the overall impact of a particular requirement both on the persons protected by the statute and those regulated by it.

Since it appears to be the case that the implications of this legislation have not been elaborated before the general public in sufficient detail, it seems appropriate, before issuing a Notice of Proposed Rulemaking, to solicit public comment on certain key issues which any proposed regulation would, in all likelihood, address. The Office for Civil Rights has prepared a draft regulation and preamble which sets forth a possible means of interpreting the provision. I have reviewed that draft and have attached it at Appendix A to this notice. Pursuant to Executive Order 11821 and OMB Circular A–107, the Office for Civil Rights has also prepared a draft inflationary impact statement to accompany the draft regulation. It is attached to this notice at Appendix B.

In this context, the Department invites public comment for the next 30 days on the issues that will be identified below as well as on any additional issues which members of the public believe are important to a clear understanding of the provision and whose resolution would contribute to effective administration and enforcement.

ISSUES

GENERAL

Interpretation and application of the definition of "handicapped person." Among the problems here are what disabilities are included and the meaning of the term "regarded as." (A specific question, for example, is whether drug and alcohol addicts or homosexuals are to be included within the definition.);

The degree of specificity needed to provide adequate and accurate guidance to the public but, at the same time, to allow sufficient flexibility to foster prompt cooperation and compliance (i.e., whether a regulation should be developed similar to the title VI regulation, the title IX regulation, or neither);

What time period, if any, should be allowed for recipients to achieve full compliance with any requirements imposed by the regulation, and whether adjustment periods should differ depending on the nature of the program or services in question;

EMPLOYMENT

The practical meaning of the term "qualified handicapped person" in the employment context and the wisdom of incorporating in the § 504 scheme the related concepts of "reasonable accommodation" to the handicapped person and "undue hardship" to the employer, both of which have been included in the Department of Labor's regulation implementing section 503 of the Rehabilitation Act (section 503 requires certain Federal contractors to take affirmative action to employ and advance in employment qualified handicapped persons);

To what extent other provisions of the section 503 regulation should be included in the section 504 regulation;

Whether to include provisions, patterned on other nondiscrimination regulations, which would require that employment tests and other selection and promotion criteria accurately measure job-related skills, that fringe benefits are equitably provided, and that other aspects of employment are equitable.

ARCHITECTURAL BARRIERS

Whether § 504 prohibitions extend to architectural barriers, and, if so, whether the nondiscrimination requirements apply to both new and existing buildings used in connection with federally assisted programs or activities;

ELEMENTARY AND SECONDARY EDUCATION

In what respects, if any, a regulation's provisions regarding elementary and secondary education should differ from the standards established by P.L. 94-142 (Education of All Handicapped Children Act of 1975) and Federal court decisions in this area;

In what way, if at all, cost or difficulty in complying (e.g., lack of adequately trained teachers or nondiscriminatory testing devices) affect recipients' obligations to comply with requirements in this area;

HIGHER EDUCATION

Whether federally assisted colleges and universities should be required to adjust certain academic requirements because of the limitations of otherwise qualified handicapped applicants and students (e.g., whether a medical school should be required to waive surgery course requirements for a blind student who wishes to be a psychiatrist, assuming a conditional medical degree would be awarded);

Whether federally assisted colleges and universities should be required to supply auxiliary academic aids, such as taped texts, readers, and interpreters, if such aids are not provided by the appropriate vocational rehabilitation agency;

What the responsibilities of federally assisted colleges and universities should be with respect to nonacademic and extracurricular activities and services, such as physical education, athletics, health services, and physical therapy;

In what way, if at all, cost or difficulty in complying should affect recipients' obligations to comply with requirements in this area;

HEALTH AND SOCIAL SERVICES

Whether a regulation should contain provisions concerning patients' rights to receive or refuse treatment and fair compensation for work done by patients;

The extent, if any, to which the size or resources of the provider of health or social services should be allowed to affect the provider's obligations (e.g., whether, by placing primary compliance responsibility on state or intermediary agencies, a concept of regional or collective compliance might be applied to providers such as doctors or small day care centers so that not every such provider would be required to be physically accessible if equivalent and accessible services were available within a convenient geographic area).

INVITATION TO COMMENT

Persons or organizations wishing to submit comments or suggestions on the matters raised in this Notice of Intent should write to the Director, Office for Civil Rights, Department of Health, Education, and Welfare, P.O. Box 1909, Washington, D.C. 20013.

Written comments and information may be submitted in any form, such as by means of letters, position papers, or memoranda. There are no special rules concerning format. However, to assure full consideration, all written comments should be submitted on or before June 16, 1976. Comments received in response to this Notice will be available for public inspection in Room 3231, 330 Independence Avenue, SW., Washington, D.C. 20201.

To enable the Department to benefit fully from the public's views on the various questions raised in this notice, the Office for Civil Rights will also seek to hold meetings with interested persons and organizations. Such meetings will focus on a broad discussion of the various ideas, comments, and recommendations presented to the Department for consideration. In addition, at those meetings, the Department representatives will be prepared to answer or discuss questions concerning the draft preamble, regulation, and inflationary impact statement, attached to this notice. Persons and organizations desiring to participate in such meetings should so advise the Office of Public Affairs, Office for Civil Rights, (202) 245-6700, as promptly as possible.

This 30-day period will not provide the sole opportunity for members of the public to comment on the issues raised by the statute and further set forth in this notice and its appendices. A Notice of Proposed Rulemaking will be published within 30 days of the close of the comment period on this notice. The Notice of Proposed Rulemaking will invite public comment for a least another 60 days during which period additional meetings and briefings will be held if necessary.

The purpose in issuing this notice is to anticipate the danger that the government might raise barriers to assisting, or might otherwise limit the opportunities of, the very people the statute is intended to protect. And an adverse public reaction to this effort, whether because of what is perceived to be a regulation that frustrates the statutory purpose, or for any other reason, would not serve the interests of handicapped Americans. Their interests and the need of this country for their productive capacity are too important for us not to be as diligent as possible.

I am most anxious to expedite the administration and enforcement of section 504, and I hope that issuance of this notice will both elicit guidance and promote understanding of the issues.

Dated: May 11, 1976.

DAVID MATHEWS,
Secretary.

APPENDIX A

PROGRAMS AND ACTIVITIES RECEIVING OR BENEFITING FROM FEDERAL FINANCIAL ASSISTANCE; NONDISCRIMINATION ON THE BASIS OF HANDICAP

The Office for Civil Rights of the Department of Health, Education, and Welfare proposes to add Part 84 to the Departmental regulation to effectuate section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), as amended by section 111(a) of the Rehabilitation Act Amendments of 1974 (29 U.S.C. 706), with regard to Federal financial assistance administered by this Department. Section 504 provides that "no otherwise qualified handicapped individual in the United States * * * shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Section 504 is similar to title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*) and title IX of the Education Amendments of 1972 (20 U.S.C. 1681 *et seq.*). It differs, however, from both these civil rights statutes in that it applies to discrimination based on handicap, from title IX in that it applies to all programs and activities receiving Federal financial assistance, and from title VI in the extent to which it applies to employment practices.

This proposed regulation contains no provisions concerning the Department's procedures for administering the statute because the Department intends to publish a consolidated procedural regulation which will apply to the enforcement of section 504. The proposed procedural regulation, which was published on June 4, 1975, at 40 FR 24148, and which would have applied to the enforcement of section 504, has been withdrawn. On May 3, 1976, the Department published, at 41 FR 18394, a notice of intent to issue a new proposed procedural regulation in order to seek public comment on a number of critical questions concerning the manner in which the Office for Civil Rights enforces various civil rights laws and authorities, including section 504. After the public comments have been evaluated, a new proposed consolidated procedural regulation will be issued.

If the consolidated procedural regulation is not in effect when the regulation implementing section 504 is published in final form, the procedural provisions of the title VI regulation, which may be found at 45 CFR Part 80, will be incorporated by reference into the section 504 regulation for use during the interim.

Subparts A (General Provisions), B (Employment Practices), and C (Program Accessibility) of this proposed regulation apply to all recipients of assistance from the Department of Health, Education, and Welfare. Because handicaps differ widely in nature and in degree of severity, discrimination against handicapped persons includes a wide range of practices with varying effect in different service areas. In order to emphasize the most common manifestations of discrimination which occur in the various programs and activities to which this Department provides assistance, additional subparts of the proposed regulation contain more specific requirements and prohibitions applicable to three major types of programs: Subpart D is concerned with preschool, elementary, secondary, and adult education programs; Subpart E, with postsecondary education programs; and Subpart F, with health and social service programs. The practices of other recipients of Departmental funds, such as public broadcasters, are subject to the general nondiscrimination provisions of § 84.4 as well as to the provisions of Subpart B and C.

A discussion of selected sections in each of the subparts of the proposed regulation is set forth in the following paragraphs. In certain instances, major

issues and the reasons for the proposed decision are discussed. Where appropriate, the various sections of the proposed regulation for section 504 have been patterned after the Departmental regulations effectuating title VI of the Civil Rights Act and title IX of the Education Amendments of 1972, found at 45 CFR Parts 80 and 86; such sections are noted in the following analysis.

Subpart A. Under § 84.2, the proposed regulation is applicable to all recipients of financial assistance from the Department of Health, Education, and Welfare and to each program or activity which receives or benefits from such assistance. All of the requirements of Part 84 apply to all recipients of Federal funds from the Department of Health, Education, and Welfare. The Secretary recognizes that recipients of Department funds vary considerably in size, complexity, and resources and that some of the requirements of this part may appear to exceed the resources of very small recipients. However, section 504 of the Rehabilitation Act of 1973 provides no exemption for recipients from its general prohibition against discrimination on the bass of amount of Federal funds received or on any other basis. The basic requirements of Part 84, therefore, apply to every recipient.

Section 84.3 contains definitions. Of particular note are paragraphs (f) and (j). Paragraph (f) defines the term "recipient" and provides that, for purposes of the regulation, the term will not apply to providers of health services (or vendors as they are often called) under title XIX of the Social Security Act (Medicaid) that do not receive other forms of Federal financial assistance. Nor will it apply to agencies used by the State to make payments to such providers under that title. This approach is identical to that followed by the Department under title VI of the Civil Rights Act of 1964.

Providers of Medicaid services include doctors, dentists, and other individual practitioners, hospials, extended care facilities (ECFs), and other similar entities. Hospitals, ECFs, and other entities of that nature, however, unlike doctors, dentists, and other individual practitioners, also receive Federal financial assistance under Part A of title XVIII of the Social Security Act (Medicare) and may receive funds under the Hill-Burton Act as well. (Part B of title XVIII, which goes to individual practitioners, is provided by way of a contract of insurance and is therefore exempt from this regulation. See § 84.3(h).)

Medicaid providers are reimbursed for their services with funds which are partially Federal and partially State. Payment of these funds to providers are made in one of three ways: (1) Directly by the State Medicaid agency, (2) indirectly through a so-called fiscal agent which in return for a payment performs the function on behalf of the State, or (3) indirectly through a "health insuring organization" which undertakes to pay in return for a premium from the State established under a contract of insurance. Under all of these arrangements, the State agency is a recipient within the terms of the regulation because it receives Federal financial assistance to enable it to offer health services. The intermediary agencies and individual providers in States using the direct payment or fiscal agent methods of administration operate health programs "receiving Federal financial assistance" as that phrase is used in the statute. "Health insuring organizations" and vendors in States using that method of administration are not recipients under the regulation because of the contract of insurance which intervenes between the State and the lower agencies. The Department does not intend to treat as recipients individual practitioners or intermediary agencies in other States whose *only* Federal connection is Medicaid funds. Rather, the Department will look to the State agency as the recipient under Medicaid and will hold that agency responsible for compliance both as to its own activities and as to the performance of its intermediary agencies and of the individual providers of federally assisted services. The Secretary expects by this means to increase the Department's efficiency in obtaining overall compliance with the provisions of this Part.

Paragraph (j) of § 84.3 defines the class of persons protected under the proposed regulation. The definition of handicapped persons in paragraph (j) (1) conforms to the statutory definition of handicapped person that is applicable to section 504, as set forth in section 111(a) of the Rehabilitation Act Amendment of 1974, Pub. L. 93–516.

The first of the three parts of the statutory and regulatory definition includes any person who has a physical or mental impairment which substantially limits one or more major life activities. The proposed regulation further defines physical or mental impairment and major life activities.

Physical or mental impairments are not, in general, defined by listing specific diseases and conditions because of the difficulty of ensuring the comprehensiveness of any such list. The term includes such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, muscular dystrophy, multiple sclerosis, cancer, diabetes, mental retardation, emotional illness, and drug and alcohol addiction. It should be noted that, under this part of the definition, a physical or mental impairment does not constitute a handicap unless its severity is such that it results in a substantial limitation of one or more major life activities.

The Department intends to interpret this first of the three parts of the definition so as to ensure that only physical and mental handicaps are included. Thus, environmental, cultural, and economic disadvantage are not in themselves covered by this part of the definition, nor are prison records, agedness, or homosexuality. If, however, a person who has any of these characteristics also has a physical or mental handicap, the person is included within the definition of handicapped persons, whether the handicap is the cause or the result of, or is unrelated to such characteristics.

In paragraph (j) (2) (i), physical or mental impairment is defined to include, among other impairments, specific learning disabilities. The Department will interpret the term as it is used in section 602 of the Education of the Handicapped Act, Pub. L. 91–230, as amended by Pub. L. 94–142. Paragraph (15) of section 602 uses the term "specific learning disabilities" to describe such conditions as perceptual handicaps, brain injury, minimal brain, dysfunction, dyslexia, and developmental aphasia; it explicitly excludes learning problems which are primarily the result of environmental, cultural, or economic disadvantage. It should be noted that section 5(b) of Pub. L. 94–192 requires the Commissioner of Education to prescribe regulations concerning the definition of specific learning disabilities and, if he or she finds that changes in the statutory definition are necessary, to submit recommendations for legislation in that regard. The Office for Civil Rights will conform its interpretation of this term to that of the Office of Education and to any amended statutory definition under the Education of the Handicapped Act.

The second of the three parts of the statutory and regulatory definition of handicapped person includes any person who has a record of a physical or mental impairment which substantially limits major life activities. "Record" is further defined in the proposed regulation so as to include both prior history of, and inappropriate classification as having, a handicap. Thus, persons who have a history of a handicapping condition but no longer have the condition, as well as persons who have been incorrectly classified as having such a condition, are protected from discrimination under section 504. Frequently occurring examples of the first group are persons with histories of mental or emotional illness, heart disease, or cancer; of the second group, persons who have been misclassified as mentally retarded.

The third of the three parts of the statutory and regulatory definition of handicapped person includes any person who is regarded as having a physical or mental impairment which substantially limits one or more major life activities. Paragraph (j) (3) of the proposed regulation limits this part of the definition to three groups of people. The first two groups are described in (j) (3) (i) and (ii) and include, primarily, persons who are ordinarily considered to be handicapped but who do not technically fall within the first two parts of the statutory definition. Thus, a person whose physical or mental impairment has a less than substantial effect upon major life activities or has a substantial effect only upon minor life activities, such as a person with a limp, is considered handicapped for the purpose of section 504 if a recipient treats the impairment as constituting a handicap. The second group of persons who fall within this category, described at (j) (3) (ii), are those who have overcome their impairment to the point that any substantial limitation to major life activities is the result of the attitudes of other persons toward their impairment;

this paragraph also includes some persons who might not ordinarily be considered handicapped, such as persons with disfiguring scars. Any limitations which such persons experience as a result of the impairment are not, in fact, caused by the disability but by the actions of other persons predicated on a view that the impairment constitutes a limitation.

Paragraph (j) (3) (iii) includes persons who have no physical or mental impairment but are treated by a recipient as if they were handicapped. If, for example, a nonhandicapped employee were to have a convulsion as a result of an a typical reaction to medication, any discriminatory employment practice based upon the conclusion that the person is epileptic would be prohibited by the proposed regulation.

Although it could be argued that homosexuals fall within the class protected by section 504 by virtue of this third part of the statutory definition, it is the view of the Department that they are not so included. Comment is solicited with respect to this determination.

Paragraph (k) of § 84.3 defines the term "qualified handicapped person." Throughout the proposed regulation, this term is used instead of the statutory term "otherwise qualified handicapped person." The Department believes that the omission of the word "otherwise" is necessary in order to comport with the intent of the statute because, read literally, "otherwise" qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap. Thus, a blind person might possess all of the qualifications for driving a bus except sight and could therefore be said to be an otherwise qualified handicapped person for the job of bus driving. In all other respects, the terms "qualified" and "otherwise qualified" are intended to be interchangeable.

With respect to preschool, elementary, and secondary educational services, a qualified handicapped person is defined, in paragraph (k) (3), in terms of age. As of the date of the passage of section 504 (September 26, 1973), a handicapped person is qualified for preschool, elementary, or secondary services if the person is of an age at which nonhandicapped persons are eligible for such services. In addition, the extended age ranges for which recipients must provide full educational opportunity to all handicapped persons in order to be eligible for assistance under the Education of All Handicapped Children Act, Pub. L. 94-142, are incorporated by reference in paragraph (k) (3). Thus, handicapped persons who are between the ages of three and eighteen will be considered qualified in terms of these services as of September 1, 1978, and those who are between the ages of three and twenty-one will be considered qualified as of September 1, 1980. With respect to persons aged three to five and aged eighteen to twenty-one, however, an exception exists where inconsistency with State law or practice or with court order would result from application of this requirement. This approach was chosen for the sake of consistency with the eligibility conditions imposed by the aforementioned statute and because use of a specific age range eliminates the interpretive problems inherent in other standards considered.

One alternative approach considered by the Department is based upon a standard of substantial benefit. Under this standard, a person who, because of handicap, requires educational services over a longer period of time than do nonhandicapped persons in order to acquire a comparable level of skills would be deemed qualified for as long as the person could benefit substantially from the services. The same standard was considered with respect to persons who, on the basis of handicap, have been excluded from a suitable education since the date of the passage of section 504. This standard could be consistent with the Department's general interpretation of nondiscrimination on the basis of handicap—that services must be delivered in such manner as is necessary to provide handicapped persons equal opportunity for comparable benefits. The Secretary is, however, concerned that this standard would impose undue administrative and financial hardship upon the affected education programs and therefore seeks comment on the feasibility and desirability of each alternative.

Section 84.4 contains general prohibitions against discrimination applicable to all recipients of assistance from this Department and to the programs and activities operated by such recipients. Of particular note in paragraph (b) (1) of this section are the prohibitions against providing services to handicapped persons which are not comparable to those provided to nonhandicapped persons. The term "comparable" is intended to encompass the concept of equivalent, as opposed to identical, services and to emphasize the fact that the individual needs of handicapped persons must be met to the same extent that the corresponding needs of nonhandicapped persons are met in order to avoid discrimination on the basis of handicap. This standard parallels that established under title VI of the Civil Rights Act of 1964 with respect to the provision of educational services to students whose primary language is not English. See *Lau* v. *Nichols*, 414 U.S. 563 (1974). The provision in paragraph (b) (2) of section 84.4 that restricts the meaning of the word "comparable" should be particularly noted. That provision states, "[A]id, benefits, and services, to be comparable, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result or to reach the same level of achievement, taking into account the nature of a particular person's handicap."

Paragraph (b) (2), in addition, emphasizes that, when necessary to the provision of comparable services, a recipient is obligated to provide services to handicapped persons in a manner different from that in which they are provided to others. For example, a welfare office which uses the telephone for communicating with its clients must provide alternative modes of communicating with its deaf clients.

Paragraph 84.4 (b) (1) (iii) is adopted from the title IX regulation and prohibits a recipient from assisting another entity or person which subjects participants or employees in the recipient's program to discrimination on the basis of handicap. This section might apply, for example, to financial support by a recipient to a community recreational group or to a recipient's sanctioning of a professional or a social organization. Among the criteria to be considered in each case are the substantiality of the relationship between the recipient and the other entity involved, including financial support by the recipient, and whether the other entity's activities relate so closely to the recipient's program or activity that they fairly should be considered activities of the recipient itself.

The provisions of § 84.4 (b) (3) and (4) that prohibit the utilization of criteria or methods of administration or site selection which have the effect of discriminating on the basis of handicap or which have the effect of defeating or substantially impairing the accomplishment of the objectives of the program with respect to handicapped persons are patterned after the title VI regulation. Paragraph (b) (3) also prohibits the utilization of criteria or methods of administration which perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same state; this provision is new.

Section 84.4 (b) (3) is particularly significant with respect to the obligations of State Medicaid agencies and the intermediary agencies and vendors through which they provide health services under title XIX of the Social Security Act (Medicaid). As explained in the discussion of the definition of the term "recipient", the nondiscrimination requirements of the regulation will, by virtue of the obligations imposed upon State Medicaid agencies, apply to intermediary agencies and to vendors despite the fact that, for purposes of the regulation, they are not recipients. It is through § 84.4 (a) (3)'s prohibition of discriminatory methods of administration that this imposition of obligations is accomplished.

There is one major exception to the rule that each Medicaid vendor with no other Federal connection must meet the substantive, nondiscrimination requirements of the regulation. That exception is the requirement of Subpart C involving program accessibility. The State agency's nondiscrimination obligation under Subpart C is to ensure that handicapped persons are not denied the benefits of the health services provided under the Medicaid program because of the physical inaccessibility of those services. It is, however, the cumulative effect of the agency's administration of Medicaid which must be nondiscriminatory. Thus, it is not required that the services of every Medicaid vendor be physically accessible.

The State agency must ensure, however, that the inaccessibility of a partic-

ular vendor does not result in the exclusion of handicapped persons from the services that vendor provides. The State agency could require that individual vendors either fulfill the accessibility obligation themselves (by having accessible buildings, making house calls, arranging to provide services in accessible facilities at certain times, and the like) or arrange to refer handicapped persons to other vendors who are accessible.

It is important to note that this flexibility with respect to accessibility does not apply to other nondiscrimination requirements. The issue of accessibility is further discussed in the portion of the preamble that discusses the provisions of the subpart of the regulation which applies specifically to health and social services (Subpart F).

Although the regulation's substantive requirements are applicable to nonrecipient vendors and intermediate agencies through the obligations imposed on State agencies by paragraph (b)(3), its procedural requirements, such as self-evaluation and filing of assurances, are not. State agencies, which are themselves subject to these requirements, may find that requiring these procedures of Medicaid participants will assist in fulfilling their own nondiscrimination obligations and may, of course, make such demands of vendors if they wish. The Department is considering including uniform requirement as to these matters in its cosolidated civil rights procedural regulation, discussed above, when a new proposal for that regulation is published.

Further, on the question of State Medicaid agency responsibilities under this paragraph, it should be stressed that although the primary obligation lies with the State agency, the Department has the authority to review the conduct of intermediary agencies and vendors with no Federal connection other than Medicaid as part of its obligation to ensure that the State agencies are in compliance. Therefore, while the prime target of compliance reviews and enforcement action will be the State agencies, the Department may examine the practices of intermediary agencies and vendors as well.

Finally, it should be noted that vendors which provide health services under Medicaid and which, in addition, receive Federal financial assistance under Medicare A, Hill-Burton, or other authorities are recipients under this regulation and must comply with all of its provisions.

Section 84.5, except for paragraphs (a)(2) and (3), is adopted from the title VI and title IX regulations. Paragraph (a)(1) requires a recipient who has been found to have discriminated on the basis of handicap to take remedial action to overcome the effects of that discrimination. Paragraph (a)(2) extends the responsibility for taking remedial action to a recipient which exercises control over a noncomplying recipient; paragraph (a)(3) also makes clear that handicapped persons who are not in the program at the time that remedial action is required to be taken may also be the subject of such remedial action.

Section 84.5(b) permits, but does not require, affirmative action to overcome the effect of conditions which have resulted in limited participation by handicapped persons. It should be noted that this paragraph does not affect the required actions delineated elsewhere throughout the proposed regulation.

Section 84.6 requires, as do both the title VI and IX regulations, a recipient to submit to the Director an assurance that each of its programs and activities receiving or benefiting from Federal financial assistance from this Department will be conducted in compliance with this regulation. Because such an assurance is, in effect, a contract between the Department and the recipient, it has the effect of giving aggrieved persons who are beneficiaries of federally assisted programs or activities the right to seek judicial enforcement of the regulation, under the third party beneficiary principle of contract law. See *Lemon v. Bossier Parish*, 240 F. Supp. 790 (W.D.La. 1965), aff'd 370 F. 2d 847 (5th Cir. 1967), *cert. denied*, 388 U.S. 911 (1967).

Paragraph (b) of § 84.8 requires recipients to adopt and publish grievance procedures. The Department solicits comment as to whether the final regulation should contain a procedure for the waiver of this requirement with respect to individual medical practitioners and to other small service providers.

The provisions of § 84.9, which set forth requirements concerning dissemination of policy, are in general self-explanatory. The Department's interpretation of paragraph (b)(2) of that section, which prohibits use or distribution of publications that indicate that the recipient engages in discriminatory practices in violation of section 504, may, however, be worth noting. That paragraph is identical to the corresponding provision of the title IX regulation and will be interpreted similarly. It will not, for example, be deemed by the Department to preclude the use in a college catalog of a picture of a campus building with stairs but no ramp. It will be interpreted to require that such a catalog provide countervailing evidence, such as a picture which includes a ramp or students in wheelchairs, that handicapped students attend the institution and are not treated in a discriminatory manner.

Subpart B. Subpart B prescribes requirements for nondiscrimination in the employment practices of recipients of Federal financial assistance administered by the Department. This subpart generally follows the employment provisions of the Department's regulation implementing title IX of the Education Amendments of 1972, which, in turn, generally follow the Sex Discrimination Guidelines (29 CFR Part 1604) of the Equal Employment Opportunity Commission (EEOC), implementing title VII of the Civil Rights Act of 1964, and the regulation of the Office of Federal Contract Compliance Programs (OFCCP), United States Department of Labor (41 CFR Part 60), implementing Executive Order 11246. It is also, insofar as is possible, consistent with the provisions of the interim regulation issued by the Department of Labor on June 11, 1974 at 39 FR 20566 and of the proposed regulation issued by that Department on August 29, 1975 at 40 FR 39887, effectuating section 503 of the Rehabilitation Act of 1973, as amended, which requires certain Federal contractors to take affirmative action in the employment and advancement in employment of qualified handicapped persons. Almost all recipients who are subject to this Part 84 are also subject to title VII or title IX and many are also subject to the Executive Order and to section 503.

Section 84.11 is patterned after the title IX regulation and sets forth general provisions with respect to discrimination in the area of employment. Section 84.12 provides that a recipient shall make reasonable accommodation to the known physical or mental limitations of a handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program. Where a handicapped person is not qualified to perform a particular job or where reasonable accommodation will not suffice to neutralize the effects of a person's handicap or will cause undue hardship, failure to employ or advance the handicapped person will not be considered discrimination since the failure is due to objective and necessary criteria rather than to the fact that the applicant is handicapped. A recipient may not deny an employment opportunity to a person on the ground that reasonable accommodation will be necessary to enable that person to perform adequately on the job.

Reasonable accommodation includes such actions as job restructuring to shift duties and activities in a manner which will enable the handicapped person to perform the duties essential to the job without having to perform other duties which could as easily be done by someone else without undue hardship to the employer. Part-time employment is also included. Reasonable accommodation with respect to employment also includes actions to make facilities used by employees readily accessible to and usable by handicapped persons. Such action may take the form of architectural modifications such as the addition of elevators, or it may take the form of location or relocation of particular offices or jobs so that they are in areas of the employer's facilities that are already accessible to and usable by handicapped persons. If such modifications or relocations would cause undue hardship, they need not be made.

Paragraph (c) of this section sets forth the factors which the Director will consider in determining whether an accommodation necessary to enable an applicant or employee to perform the duties of a job would impose an undue hardship. Each of these factors (the size and type of the recipient's program and the nature and cost of the accommodation) will be given weight in the determination and will be measured in relative terms. Thus, a small day care center might not be required to expend more than a nominal sum, such as that necessary to equip a telephone for use by

an otherwise qualified deaf applicant for a secretarial position, but a large school district might be required to provide a teacher's aide to a blind applicant for a teaching job. The Department solicits comment as to any additional or alternative factors which should be considered in the determination of the existence of undue hardship.

The requirements of this regulation concerning reasonable accommodation are believed by the Secretary to constitute an interpretation of the term "otherwise qualified" as used in section 504 itself. The concept of reasonable accommodation represents an attempt to draw the line between persons who, but for their inability to perform certain job related tasks in the normal manner because of their handicap, would be fully qualified to perform the job in question, and persons who, despite reasonable accommodation, are unable to perform a necessary element of the job in question. A similar obligation is imposed upon Federal contractors in the proposed and interim regulations implementing section 503 of the Rehabilitation Act, administered by the Department of Labor, as noted above. That Department reports that it has experienced no difficulty in administering the requirement of reasonable accommodation or the limitation of undue hardship. The Secretary is aware that some difficulties may be inherent in implementing this concept, however, and solicits public comment on the section as a whole.

Section 84.13(a), which is almost identical to the parallel section of the title IX regulation and to the EEOC and OFCCP regulations, provides that no test or criterion of employment which has a disproportionate, adverse effect on the employment of handicapped persons or any class of handicapped persons may be used unless it has been validated as a predictor of performance in the position in question and alternative tests which do not have such a disproportionate, adverse effect are unavailable. This standard is based upon the one established under title VII of the Civil Rights Acts of 1964 in *Griggs* v. *Duke Power Company*, 401 U.S. 424 (1971).

Section 84.13(b) requires that a recipient take into account that some tests and criteria depend upon sensory, manual, or speaking skills which may not themselves be necessary to the job in question but which may make the handicapped person unable to pass the test. The recipient must select and administer tests for any employment opportunity in such manner as is necessary to ensure that the test will measure ability to perform on the job rather than the handicapped person's ability to see, hear, speak, or perform manual tasks, except, of course, where such skills are the factors which the test purports to measure. For example, a person with a speech impediment or a handicap which affects the ability to write may be perfectly qualified for jobs which do not or need not, with reasonable accommodation, require those particular skills. Yet, if given an oral or written test, respectively, the handicapped person will be unable to perform in a satisfactory manner. The test results will not, therefore, predict job performance but, instead, will reflect impaired speech or writing skills.

Section 84.14 prohibits preemployment inquiry of an applicant as to whether the applicant is handicapped unless (1) the results are not used in connection with discrimination; (2) the inquiry is directed to determining whether the person has a handicap which would present a hazard to the person or to other employees on the particular job or would require accommodation; (3) the inquiry is accompanied by a statement assuring the nondiscriminatory use of its results; and (4) information concerning the medical condition or history of the applicant is obtained on a separate form which will be afforded confidentiality as medical records. This provision is expected to be particularly helpful in eliminating discrimination against persons with nonvisible handicaps. The Department is aware that many persons with nonvisible handicaps advocate prohibition of any mandatory preemployment inquiry by employers concerning the presence of a handicap. This prohibition has not been incorporated into the proposed regulation, however, because the Department does not consider it to be within the mandate of the statute.

Section 84.15 prohibits employers from adopting or applying any policy or practice which results in discrimination on the basis of handicap in compensation for similar work on jobs whose performance requires similar skill and responsibility. Where, as a result of reasonable accommodation to a handicapped person's limitations, the person's duties are significantly different from those performed by others in the same job classification, different compensation may be provided, but the employer must be able to show that the difference in compensation is directly related to a significant difference in duties and responsibilities.

Subpart C. In general, Subpart C prohibits the exclusion of qualified handicapped persons from programs or activities by reason of the inaccessibility or unusability of a recipient's facilities. Section 84.22 establishes the standard for nondiscrimination in regard to existing facilities. It states that a recipient's program or activity, when viewed in its entirety, must be readily accessible to handicapped persons. Paragraph (a) makes clear that a recipient is not required to make each of its existing facilities accessible to and usable by handicapped persons if accessibility to the recipient's program or activity can be achieved by other means, such as by reassignment of classes to accessible buildings, by the assignment of aides to employees or beneficiaries, or by making alterations to only some of the recipient's existing facilities. Thus, for example, a university would not have to make all of its classroom buildings accessible to handicapped students. It would, however, have to undertake enough alterations, or, if some buildings were already accessible, reschedule enough classes so that it could offer all required courses and an adequate selection of elective courses in accessible buildings. For the university to exclude a handicapped student from a specifically requested course because it is not offered in an accessible building would constitute discrimination unless an equivalent course were made available.

Similar alternative methods of complying with § 84.22 can be used by providers of health and welfare services. Because there are many small providers in the health and welfare service areas, however, some approaches which they might use to achieve accessibility are of less general applicability and are therefore discussed further in the portion of the preamble concerned with these providers.

In addition to establishing a flexible standard for compliance, this subpart, through § 84.22, permits recipients which develop and implement a transition plan to take up to three years to reach full compliance with its provisions.

Under the provisions of § 84.23, a recipient is required to conform new design and construction to the American National Standards Institute (ANSI) accessibility standards, as such standards are periodically and officially revised. The Department is aware that the ANSI standards are considered insufficient by many handicapped persons, but believes that the fact that many states and Federal agencies have adopted the ANSI standards necessitates their adoption in this regulation. An official revision of the standards is taking place at the present time and is expected to incorporate many of the recommendations of handicapped persons who are dissatisfied with the present standards.

Paragraph (b) of § 84.23 requires certain alterations to conform to the ANSI standards. If an alteration is undertaken to any portion of a building whose accessibility could be improved by the manner in which the alteration is carried out, then the alteration must be made in that manner. Thus, as minor an alteration as the installation of new carpeting is subject to the provisions of this section, since carpeting is available which enhances the ease of moving a wheelchair. Similarly, if a doorway or wall is being altered, the door or other wall opening must be made wide enough to accommodate wheelchairs. On the other hand, if the alteration consists of painting walls or altering ceilings, the provisions of this section are not applicable because neither of these alterations can be done in a way which affects the accessibility of that portion of the building.

Subpart D. Subpart D sets forth requirements for nondiscrimination in preschool, elementary, secondary, and adult education programs and activities, including secondary vocational education programs. The provisions of Subpart D apply to private education programs and activities as well as to public education programs and activities, with the exception of § 84.33, and to State as well as to local educational agencies.

Sections 84.33 through 84.36 generally conform to the standards established for

the education of handicapped persons in *Mills* v. *Board of Education of the District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972), *Pennsylvania Association for Retarded Children* v. *Commonwealth of Pennsylvania*, 334 F. Supp. 1257 (E.D. 1971), 343 F. Supp. 279 (E.D. Pa. 1972), and *Lebanks* v. *Spears*, 60 F.R.D. 135 (E.D. La. 1973), as well as in the Education of the Handicapped Act, 20 U.S.C. 601 *et seq.*

Sections 84.34, 84.35, and 84.36 require, in general, that handicapped persons, regardless of the nature or severity of their handicap, be provided, in the most normal setting feasible, as suitable, adequate, and free an education as is provided to nonhandicapped persons. The requirements imposed in these sections are designed to ensure that no handicapped child is excluded from school on the basis of handicap and, if a recipient demonstrates that placement in a regular instructional setting is not in the best interests of a handicapped student, that the student is provided with adequate alternative educational services suited to the student's needs without additional cost to the student's parents or guardian. For example, a recipient which operates a public school must either educate handicapped children in its regular program or provide such children with an appropriate alternative education at public expense, despite any resulting additional financial burden.

The recipient's duty under these sections extends to each qualified handicapped person who resides in the recipient's jurisdiction. The phrase "resides in" is intended to encompass the concepts both of legal residence and actual presence in the recipient's jurisdiction. Thus, the recipient is responsible for ensuring that the requirements of these sections are met with respect to all students to whom it provides services, including those referred from other school districts, as well as those students whom it refers to other public or private schools or institutions for services. The primary responsibility, however, lies with the recipient in whose jurisdiction the handicapped person has legal residence.

Section 84.34 sets forth the financial obligations of a recipient toward those handicapped persons for whom it has primary responsibility. If the recipient does not itself provide such persons with the requisite services, it must assume the cost of any alternative placement. If, however, a recipient offers adequate services and if alternative placement is chosen by a student's parent or guardian, then the recipient need not assume the cost of the outside services. If the parent or guardian believes that his or her child cannot be suitably educated in the recipient's program, he or she may, of course, make use of the procedural process incorporated in § 84.36(e).

It should be noted that this section extends the recipient's obligation beyond the provision of tuition payments: If a student is placed in a program which necessitates his or her being away from home, the payments must also cover room and board, transportation, and nonmedical care. Transportation must also be provided, through services or payments, if a nonresidential placement imposes transportation expenses upon a child's parents or guardian.

Section 84.35 provides that handicapped children shall be educated in the most normal setting feasible and may not be removed from the regular educational environment except when such removal is demonstrated by the recipient to be in the best interests of the handicapped student. Education in the most normal setting feasible is the education of handicapped persons, including those in public or private institutions or other care facilities, with persons who are not handicapped to the maximum extent consistent with the best interests of the handicapped person. To meet the requirement of this section, a recipient must show that the needs of the individual handicapped person in question would, on balance, be furthered by placement outside the regular educational environment.

The term "most normal setting feasible" is intended to encompass the same concept as the more commonly used "least restrictive alternative setting." It was chosen in preference to the latter term because placement alternatives cannot, in many instances, be compared on the basis of relative restrictiveness; *i.e.*, while institutional education is indeed more restrictive than noninstitutional instruction, placement in special education classes is not necessarily more restrictive than instruction in regular classes.

Section 84.36 concerns the provision of suitable educational services to handicapped persons and requires that such persons' individual educational needs be meet to the same extent as are those of nonhandicapped persons. A suitable education could consist of education in regular classes, education in regular classes with the use of supplimentary services, education in special instructional settings, separate education in private or public residential or nonresidential institutions or at home, or any combination thereof, so long as the placement is consistent with the requirements of § 84.35 and is the one best suited to the individual educational needs of the handicapped person in question. In addition, the quality of the educational services provided to handicapped students must be equal to those provided to nonhandicapped students; thus, handicapped students' teachers must be trained in the instruction of persons with the handicap in question and appropriate materials and equipment must be available. The Department is aware that the supply of adequately trained teachers may, at least at the outset of the imposition of this requirement, be insufficient to meet the demand of all recipients. This factor will be considered in determining the appropriateness of the remedy for noncompliance with this section.

Because the failure to provide handicapped persons with a suitable education is so frequently the result of misclassification or misplacement, paragraph (a) of § 85.36 makes compliance with its provisions contingent upon adherence to certain procedures designed to ensure appropriate classification and placement. These procedures are delineated in paragraphs (b) through (e) of § 84.36 and are concerned with testing and other evaluation methods and with procedural due process rights.

Paragraph (c) of § 84.36 establishes procedures designed to ensure that children are not misclassified or unnecessarily labeled as being handicapped because of inappropriate selection, administration, or interpretation of evaluation materials. This problem has been extensively documented in *Issues in the Classification of Children*, a report by the Project on Classification of Exceptional Children, in which the HEW Interagency Task Force participated. The provisions of this paragraph are aimed primarily at abuses in the placement process which result from misuse of, or undue or misplaced reliance on, standardized scholastic aptitude tests. Subparagraph one requires recipients to provide and administer evaluation materials in the primary language of the student. Subparagraphs two through four are, in general, intended to prevent misinterpretation and similar misuse of test scores. Subparagraph five requires a recipient to administer tests to a student with impaired sensory, manual, or speaking skills in whatever manner is necessary to avoid distortion of the test results by the impairment.

Subparagraphs six through eight require a recipient to draw upon a variety of sources in the evaluation process so that the possibility of error in classification is minimized. In particular, subparagraph seven requires that all significant factors relating to the learning process, including adaptive behavior, be considered. (Adaptive behavior is the effectiveness with which the individual meets the standards of personal independence and social responsibility expected of her or his age and cultural group.) In addition, subparagraph eight requires that a student not be placed outside the regular instructional setting if the information derived either from testing or from other sources results in a showing that the student does not need to be so placed.

Paragraph (e) of § 84.36 incorporates from the Education of the Handicapped Act, 20 U.S.C. 1415, as amended by Pub. L. 94-142, certain due process procedures which a recipient must afford to parents or guardians before taking any action regarding the educational placement, denial of placement, or transfer of placement of a person who, because of handicap, needs or is believed to need special instruction or related services. The safeguards thereby incorporated include the rights to prior notice, to examine relevant records and to obtain an independent evaluation of the person, to present complaints, and to obtain an impartial due process hearing. A recipient must also establish procedures for the protection of handicapped students who are wards of the state or whose parents or guardian are unknown or unavailable.

Section 84.37 requires a recipient to provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for comparable participation in such services and activities. Because these services and activities are part of a recipient's education program, they must, in accordance with the provisions of § 84.35, be provided in the most normal setting feasible. Paragraph (c)(2) does permit separation or differentiation with respect to the provision of physical education and athletics activities, but any such action must be necessitated by considerations of health and safety or by the interests of the students. It is expected that little separation or differentiation will be necessary since most handicapped students are able to participate in one or more regular physical education and athletics activities. For example, a student in a wheelchair can participate in regular archery courses, as can a deaf student in wrestling.

Similar participation by handicapped students in the other services and activities enumerated in § 84.39 will, in most cases, be feasible. Where, however, a student's handicap is such that participation in regularly offered activities and services is not possible, the recipient must provide comparable activities and services in which the student can participate. For that reason, a recipient is allowed one year from the effective date of the final regulation to comply with the requirements of the section. Comment is solicited as to the advisability of including this one year period in the final regulation.

Comment is also solicited on the question of whether to include in the final regulation a provision allowing recipients until September 1, 1978 to reach full compliance with the requirements concerning free and suitable education for all handicapped children. Such a provision has been considered for the sake of consistency with the Education of All Handicapped Children Act, Pub. L. 94–142, but has been rejected because of the difference in statutory authority (section 504 itself contains no authority for delaying enforcement, whereas Pub. L. 94–142 does) and because of the fundamental nature of the rights involved.

Subpart E. Subpart E generally follows the Department's title IX regulation and prescribes requirements for nondiscrimination in recruitment and admission of students to postsecondary education programs and activities, including vocational education programs and activities, as well as for the nondiscriminatory treatment of students in such programs and activities. In addition to a general prohibition of discrimination on the basis of handicap in § 84.42(a), the regulation delineates, in § 84.42(b), specific prohibitions relating to the establishment or use of quotas, the use of tests or selection criteria, and preadmission inquiry.

The standard established in § 84.42 (b)(2) for admissions tests and other similar criteria parallels that used in the employment provisions of the regulations. This provision prescribes overall success in the education program in question as the relevant criterion against which to validate any questionable selection device. Success in this context is to be measured in terms of students' entire scholastic record in the program in question and not just against first year grades. The decision to require that a test be validated as a predictor of success throughout the entire period of study in the program, rather than as a predictor of success in the first year of study, was based upon the fact that many handicapped persons, as a result of the discriminatory practices of recipients which operate elementary and secondary education programs, are not as thoroughly prepared for college as are non-handicapped persons and therefore may take longer to demonstrate their capabilities in regard to college work. Because admissions tests are commonly validated against first year grades, this requirement may be difficult for educational institutions to comply with, and the Department therefore seeks comment on this provision.

Section 84.42(b) also requires a recipient to assure itself that admissions tests are selected and administered to applicants with impaired sensory, manual or speaking skills in such manner as is necessary to avoid unfair distortion of test results. Methods have been developed for testing the abilities and achievement of persons who lack the ability to take written tests or even to make the marks required for mechanically scored objective tests; in addition, methods for testing persons with visual or hearing impairments are available. A recipient, under this paragraph, must assure itself that such methods are used with respect to the selection and administration of any admissions tests of which it makes use.

Section 84.43 is the same as the corresponding section in the title IX regulation and contains general provisions prohibiting the discriminatory treatment of qualified handicapped students. Paragraph (b) of this section requires a recipient to develop and implement a procedure to ensure that the operator or sponsor of an education program or activity not operated wholly by the recipient, but in which the recipient requires the participation of its students or employees, takes no action which the regulation would prohibit the recipient from taking. This requirement would apply, for example, to a college's responsibility to ensure that discrimination on the basis of handicap does not occur in connection with the teaching assignments of student teachers in schools not operated by the college. If the recipient finds that such discrimination is taking place and is unable to secure its prompt correction, it is required to terminate its connection with the operating or sponsoring entity.

Paragraph (c) of this section prohibits a recipient from excluding qualified handicapped students from any course, course of study, or other part of its education program or activity. This paragraph is designed to eliminate the practice of excluding qualified handicaped persons from specific courses and from areas of concentration because of factors such as ambulatory difficulties of the student or the assumption that no jobs would be available in the area in question for a person with that handicap.

Section 84.44 requires the recipient to make certain adjustments to academic practices which discriminate or have the effect of discriminating on the basis of handicap. Paragraph (a) prohibits the imposition upon handicapped students of academic requirements which have such discriminatory effect. For example, the failure to permit an otherwise qualified handicapped student who is deaf to substitute an art appreciation course for a music appreciation course would be considered a discriminatory practice unless such an action could be demonstrated by the recipient to violate interests which are essential to the recipient's program.

Paragraph (d) provides that a recipient must take steps to ensure that no handicapped student is subjected to discrimination under the recipient's postsecondary education program or activity because of the absence of necessary auxiliary educational aids for students with impaired sensory, manual, or speaking skills. Such aids might include braille texts, readers, equipment adopted for use by students with manual impairments, equipment for making orally delivered materials available to students with hearing impairments, and other similar devices and services. The intent of this section is that aids such as those described be made available in libraries or other source centers operated by the recipient rather than that every classroom or laboratory be fully equipped with aids. Moreover, a recipient would not be required to furnish individually prescribed aids and devices for general use, such as wheelchairs, hearing aids, eyeglasses, and orthopedic devices. It should be noted that in most cases this provision will not impose any additional burden on a recipient because auxiliary aids are usually provided to handicapped students by vocational rehabilitation agencies.

Paragraph (a) of § 84.47 prohibits discrimination against qualified handicapped persons in the provision of financial assistance to students. It provides that recipients may not provide less assistance to or limit the eligibility of qualified handicapped persons for such assistance, whether the assistance is provided directly by the recipient or by another entity through the recipient's sponsorship. If, however, the recipient administers wills, trusts, or similar legal instruments that require awards to be made in a discriminatory manner, such awards are permissible only if the overall effect of the recipient's provision of financial assistance is not discriminatory on the basis of handicap.

The awarding of athletic scholarships is not prohibited by these provisions. Moreover, it will not be considered discriminatory to deny, on the basis of

handicap, an athletic scholarship to a handicapped person if the handicap renders the person unqualified for the award. For example, a student who has cerebral palsy and is in a wheelchair could be denied a varsity football scholarship on the basis of handicap, but a deaf person could not, solely on the basis of handicap, be denied a scholarship for the school's diving team. The deaf person could, however, be denied the scholarship on the basis of comparative diving ability.

Paragraph (a) of § 84.48 establishes the same standards concerning nondiscrimination in the provision of physical education courses and athletic programs as does § 84.37(c) of Subpart D, discussed above, and will be interpreted in a similar fashion.

Subpart F. Subpart F applies to health, welfare, and social service programs and to recipients which operate such programs. The Departmental regulation implementing title VI of the Civil Rights Act of 1964, which applies to the same recipients as does section 504, does not contain special provisions in this area. However, the Secretary believes that the particular characteristics inherent in discrimination on the basis of handicap warrant their inclusion here.

Under §§ 84.52 and 84.53, recipients operating health, welfare, and social service programs are expressly prohibited from denying these services to qualified handicapped persons. As noted in the above discussions concerning the provisions of Subparts A and C, providers of services whose sole Federal connection is through the Medicaid program will not be treated as recipients under this regulation but their nondiscrimination will be ensured, pursuant to § 84.4 (b)(3), by the State Medicaid agencies. Other health providers receiving Federal assistance through provisions such as Medicare and Hill-Burton, however, will continue to be treated as recipients.

The Secretary realizes that it may be impossible for every private practitioner under Medicaid to make his or her services totally accessible to handicapped patients, just as it may be for some school districts to make every classroom or every building accessible. Thus, for example, as provided in Subpart C, for the State agency to be in compliance, a single doctor whose only Federal connection is under Medicaid might simply be required to make house calls or make arrangements for referrals, rather than to make architectural modifications to ensure his or her accessibility. The basic intention of the statute and the regulation, however, remains that no handicapped person should be denied the benefits of federally assisted programs, including health services reimbursed under Medicaid. Therefore, the State Medicaid agency must ensure that these services, when viewed in their entirety, are readily accessible.

In terms of "program" size and administrative structure, there is no equivalent to the local school district in the health services delivery system. The Medicaid program is administered through geographic areas much larger than the customary school district program area, and the phrase "readily accessible" implies clear limits on the distance a handicapped person should be required to travel in order to find a physically accessible service. In terms of distance traveled, the concept of "catchment area," as used in the National Health Planning and Resources Act of 1974, Pub. L. 93-641, may be the most reasonable approach to a "program" area within which comparable services could be made readily accessible to handicapped persons. If so, one method of compliance for local physicians and the State Medicaid program administrators would be to ensure that handicapped persons have ready access, within the health service area, to a range of Medicaid reimbursed services comparable to that available for the nonhandicapped.

For example, if there were three neurologists accepting Medicaid patients within the health service area, the State Medicaid agency must ensure that at least one of them is readily accessible to handicapped patients. Therefore, the responsibility for any Medicaid provider whose office is not accessible would be to refer handicapped patients to an accessible physician offering comparable services within the area. Alternatively, the provider could arrange to make his or her services accessible to handicapped patients by scheduling a few hours each week in an accessible setting, such as a local clinic or hospital, or by calling at the home of such patients. Although these alternative methods of meeting the nondiscrimination obligation are recognized, the responsibility for nondiscrimination rests first with the State Medicaid agency but also with each individual practitioner who accepts Medicaid reimbursement.

The Secretary seeks comments especially upon the enforcement approach proposed above with respect to providers which receive Federal assistance solely under Medicaid. Additionally, it has been proposed that the Health Service Agency which receives Federal funds for comprehensive health planning for each health service area be required to include in its annual plan a description of the specific arrangements which ensure compliance with this regulation within its health service area.

Under § 84.54, a recipient which operates or supervises a residential or day care program or activity for persons who are institutionalized because of handicap must ensure that any such persons who are qualified for educational services are provided with a suitable education in accordance with the requirements of Subpart D. The proposed regulation does not, however, contain any provisions concerning adequate and appropriate psychiatric care or safe and humane living conditions for persons institutionalized because of handicap. The Secretary is of the opinion that to promulgate rules on this subject would exceed his authority under the nondiscrimination provisions of section 504.

It is hereby certified that the economic and inflationary impacts of this proposed regulation have been carefully evaluated in accordance with OMB Circular A-107.

PART 84—NONDISCRIMINATION ON THE BASIS OF HANDICAP IN FEDERALLY ASSISTED PROGRAMS

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AUTHORITY: Sec. 504, Rehabilitation Act of 1973, Pub. L. 93-112, 87 Stat. 394 (29 U.S.C. 794); sec. 111(a), Rehabilitation Act Amendments of 1974, Pub. L. 93-516, 88 Stat. 1619 (29 U.S.C. 706).

Subpart A—General Provisions

§ 84.1 Purpose.

The purpose of this part is to effectuate section 504 of the Rehabilitation Act of 1973, which is designed to eliminate discrimination on the basis of

handicap in any program or activity receiving Federal financial assistance.

§ 84.2 Application.

This part applies to each recipient of Federal financial assistance from the Department of Health, Education, and Welfare and to each program or activity assistance.

§ 84.3 Definitions.

As used in this part, the term:

(a) "The Act" means the Rehabilitation Act of 1973, Pub. L. 93-112, as amended by the Rehabilitation Act Amendments of 1974, Pub. L. 93-516.

(b) "Section 504" means section 504 of the Act.

(c) "Department" means the Department of Health, Education, and Welfare.

(d) "Secretary" means the Secretary of the Department of Health, Education, and Welfare.

(e) "Director" means the Director of the Office for Civil Rights of the Department.

(f) "Recipient" means any State or political subdivision thereof, any instrumentality of a State or political subdivision thereof, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance. For the purpose of this part, the term does not include providers of health services whose sole source of Federal financial assistance is that provided under title XIX of the Social Security Act, 42 U.S.C. 1901 et seq., (Medicaid) and agencies used by the State to make payments to such providers under that title.

(g) "Applicant for assistance" means one who submits an application, request, or plan required to be approved by a Department official or by a recipient as a condition to becoming a recipient.

(h) "Federal financial assistance" means any grant, loan, contract, or any other arrangement, except contracts of insurance or guaranty, by which the Department provides or otherwise makes available assistance in the form of:

(1) Funds;

(2) Services of Federal personnel; or

(3) Property (both real and personal) or any interest therein or use thereof, including:

(i) Transfers or leases of such property for less than fair market value or for reduced consideration; and

(ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal government.

(i) "Facility" means all or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or interests therein.

(j) "Handicapped person." (1) "Handicapped person" means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

(2) As used in paragraph (j)(1) of this section, the term:

(i) "Physical or mental impairment" means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities; and (C) any medically recognizable disorder or condition that has not been definitely characterized as physical, rather than mental, or as mental, rather than physical, or that is characterized as both physical and mental.

(ii) "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, communicating, seeing, breathing, learning, and working.

(iii) "Record" means any documentation of a history of a mental or physical impairment which substantially limits one or more major life activities, whether or not that documentation is accurate or appropriate.

(3) As used in paragraph (j)(1) of this section, the phrase "is regarded as having an impairment" means (i) has a physical or mental impairment which does not substantially limit major life activities but which is treated by a recipient (or other person or entity acting for or in cooperation with the recipient) as constituting such a limitation, (ii) has a physical or mental impairment which substantially limits major life activities only as a result of the attitudes of others toward such impairment, or (iii) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by a recipient (or other person or entity acting for or in cooperation with the recipient) as having such an impairment.

(k) "Qualified handicapped person" means:

(1) With respect to employment, a handicapped person who can perform the essential functions of the job in question;

(2) With respect to postsecondary and vocational education services, a handicapped person who meets the academic or technical standards requisite to admission or participation in the recipient's education program or activity;

(3) With respect to preschool, elementary, secondary, or adult educational services, a handicapped person (i) of any age during which nonhandicapped persons are eligible for such services and (ii) to whom a State is required to provide a free appropriate public education under section 612 of the Education of the Handicapped Act, 20 U.S.C. 1412, as amended by section 5(a) of Pub. L. 94-142; and

(4) With respect to other services, a handicapped person who meets the eligibility requirements for the receipt of such services.

(l) "Handicap" means any condition or characteristic which renders a person a handicapped person as defined in paragraph (j) of this section.

(m) "Student" means a person who has gained admission to an education program or activity.

§ 84.4 Discrimination prohibited.

(a) *General.* No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives or benefits from Federal financial assistance, except as provided in §§ 84.22 and 84.37.

(b) *Discriminatory actions prohibited.* (1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual or other arrangements, on the basis of handicap:

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service or afford him or her an opportunity to do so which is not comparable to that afforded others;

(ii) Provide a qualified handicapped person with an aid, benefit, or service which is not comparable to that provided to others;

(iii) Aid or perpetuate discrimination against a qualified handicapped person by providing assistance to any agency, organization, or person which discriminates on the basis of handicap in providing any aid, benefit, or service to beneficiaries of the recipient's program; or

(iv) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

(2) A recipient shall provide aid, benefits, and services to handicapped persons in a manner different from that in which they are provided to others when such action is necessary to provide qualified handicapped persons with aid, benefits, or services which are comparable to those provided to others. For purposes of this part, aids, benefits, and services, to be comparable, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result or to reach the same level of achievement, taking into account the nature of a particular person's handicap.

(3) In determining the types of aid, benefits, services, or facilities which will be provided, the class of persons to whom or the situation in which aid, benefits, services, or facilities will be provided, or the class of persons to be afforded an opportunity to participate in any program or activity, a recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (i) which have the effect of subjecting qualified handicapped persons to discrimination on the basis of handi-

cap. (ii) which have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to handicapped persons, or (iii) which perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same State.

(4) In determining the site or location of a facility, an applicant for assistance or a recipient may not make selections (i) which have the effect of excluding handicapped persons from, denying them the benefits of, or otherwise subjecting them to discrimination under any program or activity which receives or benefits from Federal financial assistance or (ii) which have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the program or activity with respect to handicapped persons.

(5) As used in this section, the aid, benefit, or service provided under a program or activity receiving or benefiting from Federal financial assistance shall include any aid, benefit, or service provided in or through a facility which has been constructed, expanded, altered, or acquired, in whole or in part, with Federal financial assistance.

(c) *Programs limited by Federal law.* The exclusion of nonhandicapped persons from the benefits of a program limited by Federal law to handicapped persons or the exclusion of a specific class of handicapped persons from a program limited by Federal law to a different class of handicapped persons is not prohibited by this part.

§ 84.5 Remedial action, affirmative action, and self-evaluation.

(a) *Remedial action.* (1) If the Director finds that a recipient has discriminated against persons on the basis of handicap in violation on this part, the recipient shall take such remedial action, consistent with judicial standards, as the Director finds adequate to overcome the effects of the discrimination.

(2) Where a recipient is found to have discriminated against persons on the basis of handicap in violation of this part and where another recipient exercises control over the recipient which has so discriminated, the Director, where appropriate, may require either or both recipients to take remedial action.

(3) The Director may, where necessary to overcome the effects of discrimination, require a recipient to take remedial action with respect to handicapped persons who are no longer participants in the recipient's program but who were participants in the program when such discrimination occurred.

(b) *Affirmative action.* In the absence of a finding of discrimination in violation of this part, a recipient may take steps, in addition to any action which is required by this part, to overcome the effects of conditions which resulted in limited participation in the recipient's program or activity by qualified handicapped persons.

(c) *Self evaluation.* (1) A recipient shall, within one year of the effective date of this part:

(i) Evaluate its current policies and practices and the effects thereof, in terms of the requirements of this part;

(ii) Modify any of these policies and practices which do not or may not meet the requirements of this part; and

(iii) Take appropriate remedial steps to eliminate the effects of any discrimination which resulted or may have resulted from adherence to these policies and practices.

(2) For at least three years following completion of the evaluation required under paragraph (c)(1) of this section, recipients shall maintain on file and shall provide to the Director upon request a description of any modifications made pursuant to paragraph (c)(1)(ii) of this section and of any remedial steps taken pursuant to paragraph (c)(1)(iii) of this section.

§ 84.6 Assurances required.

An applicant for Federal financial assistance for a program or activity to which this part applies shall submit an assurance, on a form specified by the Director, that the program will be operated in compliance with this part. An applicant may incorporate these assurances by reference in subsequent applications to the Department.

§ 84.7 Duration of obligation and covenants.

(a) *Duration of obligation.* (1) In the case of Federal financial assistance extended to provide real property or structures thereon, the assurance shall obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used for the purpose for which Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

(2) In the case of Federal financial assistance extended to provide personal property, the assurance shall obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases the assurance shall obligate the recipient for the period during which Federal financial assistance is extended.

(b) *Covenants.* (1) Where Federal financial assistance is provided in the form of real property or interest therein from the Federal Government, the instrument effecting or recording this transfer shall contain a covenant running with the land to assure nondiscrimination for the period during which the real property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

(2) Where no transfer of property is involved but property is purchased or improved with Federal financial assistance, the recipient shall agree to incude the covenant described in paragraph (b)(2) of this section in the instrument effecting or recording any subsequent transfer of the property.

(3) Where Federal financial assistance is provided in the form of real property or interest therein from the Federal Government, the covenant shall also include a condition coupled with a right to be reserved by the Department to revert title to the property in the event of a breach of the covenant. If a transferee of real property proposes to mortgage or otherwise encumber the real property as security for financial construction of new, or improvement of existing, facilities on the property for the purposes for which the property was transferred, the Director may, upon request of the transferee and if necessary to accomplish such financing and upon such conditions as he or she deems appropriate, agree to forbear the exercise of such right to revert title for so long as the lien of such mortgage or other encumbrance remains effective.

§ 84.8 Designation of responsible employee and adoption of grievance procedures.

(a) *Designation of responsible employee.* A recipient shall designate at least one person to coordinate its efforts to comply with and carry out its responsibilities under this part.

(b) *Adoption of grievance procedures.* A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of complaints alleging any action prohibited by this part.

§ 84.9 Dissemination of policy.

(a) *Notification of policy.* (1) A recipient shall implement specific and continuing steps to notify all participants, beneficiaries, applicants, employees, other interested persons, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of handicap in the programs which it operates and that it is required by section 504 and this part not to discriminate in such manner. The notification shall contain such information and be made in such manner as is necessary to apprise interested persons of the protections against discrimination assured them by section 504 and this part. It shall, where appropriate, state that the requirement not to discriminate in programs extends to admission or access thereto and to treatment and employment therein and shall also state that inquiries concerning the application of section 504 and this part to the recipient may be referred to a person designated by the recipient or by the Director.

(2) A recipient shall make the initial notification required by paragraph (a)(1) of this section within 90 days of the effective date of this part. Notification shall include publication in local newspapers and in newspapers and magazines operated by or on behalf of the recipient.

(b) *Publications.* (1) A recipient shall include a statement of the policy de-

scribed in paragraph (a) of this section in a prominent place in those publications containing general information which it makes available to a participant, beneficiary, applicant, employee, or other interested person.

(2) A recipient may not use or distribute a publication of the type described in paragraph (b)(1) of this section which indicates, by text or illustration, that the recipient treats participants, beneficiaries, applicants, or employees in a manner prohibited by section 504 and this part.

§ 84.10 Effect of State or local law or other requirements and effect of employment opportunities.

(a) The obligation to comply with this part is not obviated or alleviated by the existence of any State or local law or other requirement which, on the basis of handicap, imposes prohibitions or limits upon the eligibility of qualified handicapped persons to receive services or to practice any occupation or profession.

(b) The obligation to comply with this part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for handicapped persons than for nonhandicapped persons.

Subpart B—Employment Practices

§ 84.11 Discrimination prohibited.

(a) *General.* (1) No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment, or in the recruitment, consideration or selection therefor, under any programs or activity to which this part applies.

(2) A recipient shall make all decisions concerning employment under any program or activty to which this part applies in a manner which ensures that discrimination on the basis of handicap does not occur and may not segregate or classify applicants or employes in any way which could adversely affect an applicant's or employee's opportunities or status because of handicap.

(3) A recipient may not participate in a contractual or other relationship which has the effect of subjecting qualified handicapped applicants or employees to discrimination prohibited by this subpart. The relationship referred to in this subparagraph include relationships with employment and referral agencies, with labor unions, with organizations providing or administering fringe benefits to employees of the recipient, and with organizations providing training and apprenticeship programs.

(b) *Specific activities.* The provisions of this subpart apply to:

(1) Recruitment, advertising, and the processing of applications for employment;

(2) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation and changes in compensation;

(4) Job assignments, job classifications, organizational structure, position descriptions, lines of progression, and seniority lists;

(5) Departure and return from leaves of absence, sick leave, or any other leave;

(6) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(7) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;

(8) Employer sponsored activities, including social or recreational programs; and

(9) Any other term, condition, or privilege of employment.

(c) A recipient shall comply with this subpart regardless of the terms of any collective bargaining agreement to which it is a party.

§ 84.12 Reasonable accommodation.

(a) A recipient shall make reasonable accommodation to the known physical or mental limitations of a handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

(b) Reasonable accommodation includes (1) making facilities used by employees readily accessible to and usable by handicapped persons and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, and other similar actions.

(c) In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of a recipient's program, factors to be considered include:

(1) The overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget;

(2) The type of the recipient's operation, including the composition and structure of the recipient's workforce; and

(3) The nature and cost of the accommodation needed.

(d) A recipient may not deny any employment opportunity to a qualified handicapped employee or applicant or determine a handicapped employee or applicant to be unqualified if the basis for the denial or determination is the necessity for reasonable accommodation to the physical or mental limitations of the employee or applicant as required in this section.

§ 84.13 Employment criteria.

(a) A recipient may not make use of any test or criterion which has a disproportionate, adverse effect on the employment opportunities of handicapped persons or any class of handicapped persons unless (1) the test or criterion, as used by the recipient, has been validated as a predictor of performance for the position in question and (2) alternative tests or criteria for such purpose which have a less disproportionate, adverse effect are shown to be unavailable.

(b) A recipient shall select and administer tests concerning employment in such manner as is necessary to ensure that, when administered to an applicant or employee who has a handicap which impairs sensory, manual, or speaking skills the test results accurately reflect the applicant's or employee's job skills, aptitude, or whatever other factor the test purports to measure, rather than reflecting the applicant's or employee's impaired sensory, manual, or speaking skills (except where such skills are the factors which the test purports to measure).

§ 84.14 Preemployment inquiries.

(a) A recipient may not make preemployment inquiry of an applicant as to whether the applicant is a handicapped person or as to the nature or severity of a handicap in a manner which results in discrimination prohibited by this subpart.

(b) Preemployment inquiries shall be limited to those necessary to determine whether the person has a handicap which would constitute a hazard to that person or to other employees or which would require accommodation under section 84.12.

(c) Preemployment inquiries shall be accompanied by a statement that the recipient is subject to this subpart and assuring that information obtained from the inquiries will not be used in a manner which would result in discrimination prohibited by this subpart.

(d) Information obtained in accordance with this section as to the medical condition or history of the applicant shall be collected only through use of separate forms which shall be accorded confidentiality as medical records. Supervisors may, however, be given information and instructions necessary to the person's health and safety and may be informed of work restrictions and necessary accommodations.

§ 84.15 Compensation.

A recipient may not adopt or apply any policy or practice which, on the basis of handicap, result in the payment of wages or other compensation to handicapped employees at a rate less than that paid to nonhandicapped employees for similar work on jobs whose performance requires similar skill and responsibility.

§ 84.16 Fringe benefits.

(a) In making fringe benefits available to employees, a recipient may not:

(1) Administer, operate, offer, or participate in a fringe benefit plan which does not provide for equal benefits to handicapped and nonhandicapped persons and equal contributions to the plan by handicapped and nonhandicapped persons unless any difference in benefits or contributions is justified by verifiable actuarial figures and an actual, substantial increase in cost to the recipient; or

(2) Otherwise discriminate on the basis of handicap.

(b) Fringe benefits include any medical, hospital, disability, accident, life insurance, or retirement benefit, service, policy, or plan, any profit sharing or bonus plan, leave, or any similar employment benefit or service.

Subpart C—Program Accessibility

§ 84.21 Discrimination prohibited.

No qualified handicapped person shall, because a recipient's facilities are inaccessible to or unusable by handicapped persons, be denied the benefit of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity to which this part applies.

§ 84.22 Existing facilities.

(a) *Program accessibility.* A recipient shall, through the elimination of physical obstacles or through other methods, operate each program or activity to which this part applies so that the program or activity, when viewed in its entirety, is readily accessible to handicapped persons. This paragraph shall not necessarily be interpreted to require a recipient to make each of its existing facilities accessible to and usable by handicapped persons.

(b) *Methods.* In order to comply with paragraph (a) of this section, a recipient may employ such means as alteration of existing facilities, construction of new facilities, redesign of equipment, reassignment of classes to accessible buildings, assignment of aides to employees or beneficiaries, home visits by health and welfare agencies and providers, or any other methods which result in making its program or activity accessible to handicapped persons.

(c) *Time period.* A recipient shall achieve program accessibility as expeditiously as possible but in no event later than three years from the effective date of this part.

(d) *Transition plan.* A recipient which is not in compliance with paragraph (a) of this section on the effective date of this part shall develop, within six months of such date, a transition plan to achieve program accessibility. The transition plan shall, at a minimum:

(1) Identify physical obstacles in the recipient's facilities which limit the accessibility of its program or activity to handicapped persons;

(2) Establish priorities for achieving program accessibility on the basis of those activities which are most essential to beneficiaries of the recipient's program;

(3) Describe in detail the methods which will be used to make the recipient's program accessible;

(4) Specify the schedule for taking the steps necessary to achieve program accessibility and, if the time period of the transition plan is longer than one year, identify steps which will be taken during each year of the transition period in accordance with the priorities established under paragraph (d)(2) of this section; and

(5) Indicate the person responsible for implementation of the plan.

(e) *Notice.* The recipient shall adopt and implement procedures to ensure that interested persons are informed (1) of the existence and location of accessible services and activities, (2) of facilities which are accessible to and usable by handicapped persons, and (3) of any transition plan developed pursuant to paragraph (d) of this section and the schedule established therein.

§ 84.23 New construction.

(a) *Design and construction.* Each facility or part of a facility designed or constructed by, on behalf of, or for the use of a recipient after the effective date of this part shall be designed or constructed in such manner that the facility or part of the facility is readily accessible to and usable by handicapped persons.

(b) *Alteration.* Each facility or part of a facility which is altered by, on behalf of, or for the use of a recipient after the effective date of this part in a manner which affects or could affect the usability of the facility or part of the facility shall be altered in such manner that the altered portion of the facility is readily accessible to and usable by handicapped persons.

(c) *American National Standards Institute accessibility standards.* To meet the requirement of paragraphs (a) and (b) of this section, a recipient shall conform the design, construction, and alteration of its facilities to the "American National Standard Specifications for Making Buildings and Facilities Accessible to, and Usable by, the Physically Handicapped," published by the American National Standards Institute, Inc., as such standards are periodically and officially revised.

(d) *Architectural and Transportation Barriers Compliance Board.* If a facility of a recipient is subject to the requirements of this part and section 504 as well as to the requirements of section 502 of the Act and any applicable regulation promulgated by the Architectural and Transportation Barriers Compliance Board, the Department will, for a reasonable period of time not to exceed sixty days, defer action pending review by the Board.

Subpart D—Preschool, Elementary, and Secondary Education

§ 84.31 Application of this subpart.

Subpart D applies to preschool, elementary, secondary, and adult education programs and activities which receive or benefit from Federal financial assistance and to recipients which operate, or which receive or benefit from Federal financial assistance for the operation of, such programs or activities.

§ 84.32 Preschool and adult education programs.

(a) A recipient which operates a preschool education or day care program or activity or an adult education program or activity may not, on the basis of handicap, deny access to such program or activity to qualified handicapped persons and shall take into account the needs of such persons in determining the aid, benefits, or services to be provided under such program or activity.

(b) A recipient which operates or sponsors a preschool compensatory education program or activity for children who are deemed disadvantaged because of cultural, economic, or linguistic conditions may not, on the basis of handicap, exclude any qualified handicapped person from its program or activity.

§ 84.33 Location and notification.

A recipient which operates a public education program shall:

(a) Annually undertake to identify and locate every qualified handicapped person residing in the recipient's jurisdiction who is not receiving a public education;

(b) Notify handicapped persons and their parents or guardians of the recipient's duty under this subpart; and

(c) Publicize generally such duty.

§ 84.34 Free education.

(a) A recipient to which this subpart applies shall provide a free education to each qualified handicapped person who resides in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.

(b) For the purpose of this section, the provision of a free education is the provision of educational services without cost to the handicapped person or to his or her parents or guardians, except for those fees which are imposed on nonhandicapped persons or their parents or guardians. It may consist either of the provision of free services or, if a recipient places a handicapped person in or refers such person to a program not operated by the recipient as its means of carrying out the requirements of this part, of grants in the amount of the cost of the services to the handicapped person or to his or her parents or guardians. If the program is residential, the provision of a free education also includes the provision of nonmedical care, room and board, and transportation.

§ 84.35 Most normal setting feasible.

A recipient shall provide educational services to each qualified handicapped person who resides in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap, in the most normal setting feasible and may not remove a handicapped person from, or place such person in a setting other than, the regular educational environment except when the nature or severity of the person's handicap is such that education in regular classes with the use of supplementary aids and services is demonstrated by the recipient not to be in the best interest of such person.

§ 84.36 Suitable education.

(a) A recipient to which this subpart applies shall provide as suitable an education to each qualified handicapped person who resides in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap, as the recipient provides to nonhandicapped persons. For this purpose, the provision

of a suitable education is the provision of educational services which adequately meet the individual educational needs of the person in question, as determined by the recipient using criteria consistent with this part. In order to be suitable, the education of persons who, because of handicap, need or are believed to need special instruction or related services must be based upon adherence to procedures which satisfy the requirements delineated in paragraphs (b), (c), (d), and (e) of this section.

(b) *Preplacement evaluation.* A recipient may not take any action regarding the educational placement, denial of placement, or transfer of placement of a person who, because of handicap, needs or is believed to need special instruction or related services without fully and individually evaluating such person's educational needs.

(c) *Evaluation procedures.* A recipient shall establish standards and procedures for the evaluation and placement of persons who, because of handicap, need or are believed to need special instruction or related services which ensure, at a minimum, that:

(1) Tests and similar evaluation materials are provided and administered in the primary language of the student;

(2) Tests and similar evaluation materials have been properly and professionally validated for the specific purpose for which the recipient proposes to use them;

(3) Tests and similar evaluation materials are recommended by their producer for the specific purpose for which the recipient proposes to use them, are administered in conformance with the instructions provided by their producer, and are administered by trained personnel;

(4) Tests and similar evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient;

(5) Test selection and administration is such that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where such skills are the factors which the test purports to measure);

(6) No one test or type of test or other means of evaluation is used as the sole criterion for placement;

(7) Information from sources other than ability or achievement tests, including information concerning physical condition, sociocultural background, and adaptive behavior in home and school, is gathered and considered; and

(8) If the information derived either from ability and achievement tests or from other sources results in a showing that the student does not, because of handicap, need instruction in a special setting, the student will not be placed outside the regular instructional setting.

(d) *Reevaluation.* A recipient shall provide to each student who has been placed in a special instructional setting an annual reevaluation of his or her educational needs and progress in accordance with the procedures established in paragraph (c) of this section and shall inform the student's parents or guardian of the results of the evaluation. The adequacy of the special instruction provided to each student shall be examined and shall be a factor in determining whether a change in the student's placement is to occur.

(e) *Procedural safeguards.* A recipient shall establish and implement, with respect to actions regarding the placement, denial of placement, or transfer of placement of a person who, because of handicap, needs or is believed to need special instruction or related services, the procedural safeguards delineated in paragraphs (b) and (e)(3) of section 615 of the Education of the Handicapped Act, 20 U.S.C. 1415, as amended by section 5(a) of Pub. L. 94-142.

§ 84.37 Nonacademic services.

(a) *General.* (1) A recipient to which this subpart applies shall provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for comparable participation in such services and activities.

(2) Nonacademic and extracurricular services and activities include, but are not limited to, counseling services, physical education, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the recipient, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the recipient and assistance in making available outside employment.

(3) A recipient shall comply with the provisions of this section as expeditiously as possible but in no event later than one year from the effective date of this part.

(b) *Counseling services.* A recipient to which this subpart applies which provides personal, academic, or vocational counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap. The recipient shall ensure that handicapped students are not counseled toward more restrictive participation in available services or more restrictive career objectives than are nonhandicapped students with similar interests and abilities.

(c) *Physical education and athletics.* (1) In providing physical education courses and athletics and similar programs and activities to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient which offers physical education courses or which operates or sponsors interscholastic, club, or intramural athletics shall provide to handicapped students equal opportunities for comparable participation in these activities.

(2) Physical education and athletic activities offered to handicapped students may be separate or different from those offered to nonhandicapped students to the extent that separation or differentiation is consistent with the requirements of section 84.35 and is necessary to ensure the health and safety of the students or to take into account their interests.

§ 84.38 Comparable services.

If a recipient, notwithstanding its compliance with this part, operates a facility which is identifiable as being for handicapped students, the facility and the educational services provided therein shall be comparable to the facilities and services of the recipient which are not so identifiable.

Subpart E—Higher Education

§ 84.41 Application of this subpart.

Subpart E applies to postsecondary education programs and activities, including postsecondary vocational education programs and activities, which receive or benefit from Federal financial assistance and to recipients which operate, or which receive or benefit from Federal financial assistance for the operation of, such programs or activities.

§ 84.42 Admissions and recruitment.

(a) *General.* No qualified handicapped person shall, on the basis of handicap, be denied admission or be subjected to discrimination in admission or recruitment by a recipient to which this subpart applies.

(b) *Admissions.* In determining whether a person satisfies any policy or criterion for admission or in making any offer of admission, a recipient to which this subpart applies:

(1) May not apply limitations upon the number or proportion of handicapped persons who may be admitted;

(2) May not make use of any test or criterion for admission which has a disproportionate, adverse effect on handicapped persons or any class of handicapped persons unless (i) the test or criterion, as used by the recipient, has been validated as a predictor of overall success in the education program or activity in question and (ii) alternative tests or criteria which have a less disproportionate, adverse effect are shown to be unavailable;

(3) Shall assure itself that the selection and administration of admissions tests is such that, when an admissions test is administered to an applicant who has a handicap which impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the applicant's impaired sensory, manual, or speaking skills (except where such skills are the factors which the test purports to measure); shall assure itself that admissions tests which are designed for persons with impaired sensory, manual, or speaking skills are offered as often and in as timely a manner as are other admissions tests; and shall assure itself that admissions tests that it administers are administered in facilities which are

readily accessible to handicapped persons; and

(4) May make preadmission inquiry as to whether an applicant for admission is a handicapped person in order to comply with this part but may not use the results of the inquiry in a manner which results in discrimination on the basis of handicap.

(c) *Different admissions criteria.* A recipient may, if necessary to the furtherance of equal educational opportunity for qualified handicapped persons and if such action does not constitute the giving of a preference on the basis of handicap, apply criteria for the admission of handicapped persons which differ from the criteria applied to nonhandicapped persons, where such criteria are useful as predictors of completion of the education program or activity in question or of success in the occupation or profession for which the education program is designed to prepare students.

(d) *Recruitment.* (1) If a recipient to which this subpart applies recruits nonhandicapped applicants, it shall make comparable efforts to recruit handicapped applicants, except that the recipient may be required to undertake additional efforts to recruit handicapped applicants as remedial action pursuant to § 84.5(a) and may choose to undertake such efforts as affirmative action pursuant to § 84.5 (b).

(2) A recipient shall include in its recruitment efforts schools which are primarily or exclusively for handicapped persons and shall make known to other schools from which it recruits applicants that it is subject to the provisions of this part.

§ 84.43 Treatment of students; general.

(a) No qualified handicapped student shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any academic, research, occupational training, housing, health, counseling financial aid, physical education, athletics, recreation, transportation, other extracurricular, or other postsecondary education program or activity which receives or benefits from Federal financial assistance.

(b) A recipient to which this subpart applies which requires participation by any applicant, student, or employee in any education program or activity not operated wholly by the recipient or which facilitates, permits, or considers such participation as part of, or equivalent to, an education program or activity operated by the recipient, including participation in educational consortia and cooperative employment and student teaching assignments, (1) shall develop and implement a procedure designed to assure itself that the operator or sponsor of the other education program or activity takes no action affecting any applicant, student, or employee of the recipient which this subpart would prohibit the recipient from taking; and (2) may not facilitate, require, permit, or consider such participation if such action occurs.

(c) A recipient to which this subpart applies may not, on the basis of handicap, exclude any qualified handicapped student from any course, course of study, or other part of its education program or activity.

§ 84.44 Academic adjustments.

(a) *Academic requirements.* A recipient to which this subpart applies may not impose upon a qualified handicapped applicant or student academic requirements, including length of time permitted and specific courses required for the completion of degree requirements, that discriminate or have the effect of discriminating on the basis of handicap.

(b) *Other rules.* A recipient to which this subpart applies may not impose upon handicapped students other rules, such as the prohibition of tape recorders in classrooms or of dog guides in campus buildings, that have the effect of limiting the participation of handicapped students in the recipient's education program or activity.

(c) *Course examinations.* In its course examinations or other procedures for evaluating students' academic achievement in its program, a recipient to which this subpart applies shall provide such methods for evaluating the achievement of students who have a handicap which impairs sensory, manual, or speaking skills as are necessary to ensure that the results of the evaluation represent the student's achievement in the course, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where such skills are the factors which the test purports to measure).

(d) *Auxiliary aids.* (1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of auxiliary aids for students with impaired sensory, manual, or speaking skills. A recipient need not provide auxiliary aids in every classroom so long as they are centrally available.

(2) Auxiliary aids include braille texts and the availability of readers for students with visual impairments, equipment adapted for use by students with manual impairments, methods of making orally delivered materials available to students with hearing impairments, and other similar services and actions, but shall not include individually prescribed devices for the general use of a particular student such as eyeglasses, hearing aids, wheelchairs, and orthopedic devices.

§ 84.45 Housing.

(a) *Housing provided by the recipient.* A recipient which provides housing to its nonhandicapped students shall provide comparable and accessible housing to handicapped students at the same cost as to others. At the end of the transition period provided for in Subpart C, such housing shall be available in sufficient quantity and variety so that the scope of handicapped students' choice of living accommodations is comparable to that of nonhandicapped students.

(b) *Other housing.* A recipient which assists any agency, organization, or person in making housing available to any of its students shall take such action as may be necessary to assure itself that such housing is, as a whole, made available in a manner which does not result in discrimination on the basis of handicap.

§ 84.46 Health and insurance.

(a) *Health services.* In providing a health, medical, or hospital aid, benefit, or service to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap and shall provide handicapped students with health and similar services which are comparable to those provided to other students.

(b) *Insurance benefits.* In providing a medical, hospital, accident, or life insurance benefit, service, policy, or plan to any of its students, a recipient may not discriminate on the basis of handicap or provide such insurance benefit, service, policy, or plan in manner which would violate Subpart B if it were provided to employees of the recipient.

§ 84.47 Financial and employment assistance to students.

(a) *Provision of financial assistance.* (1) In providing financial assistance to qualified handicapped persons, a recipient to which this subpart applies may not (i) on the basis of handicap, provide less assistance than is provided to nonhandicapped persons, limit eligibility for assistance, or otherwise discriminate; or (ii) through solicitation, listing, approval, or provision of facilities or other services, assist any foundation, trust, agency, organization, or person which provides assistance to any of the recipient's students in a manner which discriminates against qualified handicapped persons on the basis of handicap.

(2) A recipient may not administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established under wills, trusts, bequests, or similar legal instruments which require awards to be made on the basis of factors which discriminate or have the effect of discriminating on the basis of handicap unless the overall effect of the award of scholarships, fellowships, and other forms of financial assistance is not, on the basis of handicap, discriminatory.

(b) *Assistance in making available outside employment.* A recipient which assists any agency, organization, or person in making employment available to any of its students (1) shall assure itself that such employment is made available in a manner which would not violate Subpart B if it were provided by the recipient; and (2) may not render such assistance to any agency, organization, or person which discriminates on the basis of handicap in its employment practices.

(c) *Employment of students by recipients.* A recipient which employs any of its students may not do so in a manner which violates Subpart B.

§ 84.48 Other prohibited discrimination.

(a) *Physical education and athletics.* (1) In providing physical education courses and athletics and similar programs and activities to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient which offers physical education courses or which operates or sponsors intercollegiate, club, or intramural athletics shall provide to hadicapped students equal opportunities for comparable participation in these activities.

(2) Physical education and athletic activities offered to handicapped students may be separate or different from those offered to nonhandicapped students to the extent that separation or differentiation is necessary to ensure the health and safety of the students or to take into account their interests.

(b) *Counseling and placement services.* A recipient to which this subpart applies which provides personal, academic, or vocational counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap. The recipient shall, at a minimum, ensure that handicapped students are not counseled toward more restrictive participation in available services or more restrictive career objectives than are nonhandicapped students with similar interests and abilities.

(c) *Social organizations.* A recipient which provides significant assistance to fraternities, sororities, or similar organizations shall assure itself that the membership practices of such organizations do not permit discrimination otherwise prohibited by this subpart.

Subpart F—Health, Welfare, and Social Services

§ 84.51 Application of this subpart.

Subpart F applies to health, welfare, and other social service programs and activities which receive or benefit from Federal financial assistance and to recipients which operate, or which receive or benefit from Federal financial assistance for the operation of, such programs or activities.

§ 84.52 Health services.

(a) *Availability of services.* (1) A recipient which provides health benefits or services may not, on the basis of handicap, deny these benefits or services to qualified handicapped persons.

(2) A recipient which provides health benefits or services may not deny these benefits or services through discriminatory application of policies regarding deposits, extension of credit, or other financial matters.

(b) *Level of services.* (1) All health services shall be provided to handicapped persons to the same extent that they are provided to nonhandicapped persons and in such manner as is necessary to afford handicapped persons equal opportunities for comparable benefits from these services.

(2) A recipient shall develop and implement procedures to assure itself that handicapped persons are not subjected to discrimination by reason of the recipient's referrals of such persons to other entities or persons providing health benefits or services.

§ 84.53 Welfare and other social services.

In providing welfare or other social services or benefits, a recipient may not, on the basis of handicap:

(a) Deny a qualified handicapped person these benefits or services;

(b) Provide benefits or services in a manner that limits or has the effect of limiting the participation of qualified handicapped persons; or

(c) Subject a handicapped person to different standards of eligibility for the benefits or services.

§ 84.54 Education of institutionalized persons.

A recipient to which this subpart applies and which operates or supervises a residential or day care program or activity for persons who are institutionalized because of handicap shall ensure that each qualified handicapped person in its program or activity is proveded a suitable education, as defined in § 84.36.

Appendix B

PRI 239-76

DISCRIMINATION AGAINST HANDICAPPED PERSONS

The Costs, Benefits and Inflationary Impact of Implementing Section 504 of the Rehabilitation Act of 1973 Covering Recipients of HEW Financial Assistance

Dave M. O'Neill

FEBRUARY 1976

PUBLIC RESEARCH INSTITUTE
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239-76 *Discrimination Against the Handicapped: The Costs, Benefits and Inflationary Impact of Implementing Section 504 of the Rehabilitation Act of 1973 Covering Recipients of HEW Grants*, Dave M. O'Neill; February 1976.

DISCRIMINATION AGAINST HANDICAPPED PERSONS
The Costs, Benefits and Inflationary Impact of Implementing Section 504 of the Rehabilitation Act of 1973 Covering Recipients of HEW Financial Assistance

Dave M. O'Neill

18 February 1976

This work was prepared for the Office for Civil Rights (HEW) under Order # SA-4141-76. The ideas expressed herein do not necessarily reflect the official positions of the Office for Civil Rights.

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ACKNOWLEDGEMENTS

A large number of people contributed very generously of their time and effort in helping prepare this report. Comments were solicited from agencies throughout the department and in other agencies and private organizations. Special thanks are due to Jack Jones and John Davis of the Department of Health, Education and Welfare (HEW), Pat Wald and Robert Plotkin of the Center for Law and Social Policy, Lucile Anderson, James Keim and Gary Mackuch of the Virginia, Maryland and Pennsylvania State Departments of Education respectively, Patrician Thoben of the Civil Service Commission, and Howard Bennet of HEW. Mr. George Majors of HEW and Mr. Dave Brigham of the Department of Labor provided valuable data sources as well as detailed and informative interviews about their experiences with the employment problems of blind individuals and with the administration of Section 503 respectively. Ed Lynch of HEW provided extensive comments, ideas, and suggestions on early versions of the report. Walt Francis of HEW provided extensive comments, ideas and suggestions on all draft versions. At several points he noted serious omissions in the analysis. Finally, Anne Beckman of HEW provided invaluable oversight and guidance as well as extensive comments, ideas and suggestions on all draft versions.

I. INTRODUCTION

The proposed regulation will implement section 504 of the Rehabilitation Act of 1973, as amended, which reads as follows:

> No otherwise qualified handicapped individual in the United States... shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Under HEW's guidelines any proposal which will have an impact exceeding $100 million in any one year is subject to the requirements of Executive Order 11821. Under the guidelines relating to Inflationary Impact Statements, any such regulation must be carefully evaluated in terms of benefits as well as costs. In addition alternatives to the proposed action must be reviewed.*

Preliminary analysis indicated the likelihood that the $100 million threshold would be crossed and an analysis required. The following analysis, although generally conforming to the stated guidelines, has some special features and limitations that should be made explicit at the outset.

Although the analysis attempts to measure cost impacts, it does not link them to effects on inflation. This regulation affects services provided primarily by the public sector, and the link between increased cost and inflationary pressure is not as direct as with regulations that increase unit costs in the private sector. For example, state and local governments may choose to cover the increased cost of special education by increasing tax revenues, or by reallocating available resources, thus precluding the inflationary pressure associated with deficit financing.

Another special feature is that some of the regulation's requirements duplicate the provisions of pre-existing federal or state law or court decree. In such instances, the effect of the section 504 regulation is to impose an additional sanction in order to hasten and to help enforce compliance. The policy decision in these cases is not whether to incur a set of costs and benefits, but whether or not to increase the rapidity with which they materialize. Thus where the regulations requirements duplicate or strengthen existing

*OMB has stressed that the statement should document all significant costs and benefits even if they do not have any direct links to the prices of goods and services that enter into the Consumer or Wholesale Price Index. In these situations the Inflationary Impact Statement becomes equivalent to the more traditional cost/benefit analysis framework in which the focus is much broader than inflation impact -- all effects that impact on resource allocation efficiency and the distribution of income, if they are large enough, are documented and evaluated in terms of benefits and costs.

mandates, it will not be possible to distinguish separately the costs and benefits of 504 as opposed to existing regulations and laws. However some part of any projected increases in costs (and benefits) should be attributed to these other provisions. Indeed for some of the sub-parts perhaps even the major part should be attributed to them.

The analysis attempts, for each of the major subparts, to present data and information on the magnitude of identifiable costs and benefits. The material is presented in a way that will help the reader evaluate the validity and reliability of the estimates. Wherever possible, ranges of estimates are presented that represent extremes of assumptions about parameters (e.g., special education costs per pupil) that we cannot measure reliably. In some cases (e.g., employment discrimination) the available evidence on costs and benefits is very indirect and impressionistic while in others (e.g., facility accessibility), measurement is more precise.

In all cases the evidence on the magnitude of benefits is, at best, based on scattered data sources and studies. Some of the numbers presented are no more than reasoned guesses. Two remarks are in order here. First, the fact that certain kinds of benefits are difficult to measure (e.g., psychic benefits) does not make them any less important. Second, we have attempted, wherever possible, to identify sub-groups of recipients based on their neediness, e.g., severely and profoundly handicapped children vs. mildly handicapped. This will help the reader in striking his own balance on the magnitude of psychic benefits.

The evaluation is divided into six sections, five of which correspond to the subparts of the proposed regulation: Subpart B, Employment Practices; Subpart C, Program Accessibility; Subpart D, Elementary and Secondary Education; Subpart E, Higher Education; and Subpart F, Health and Social Services. A final section summarizes the findings of the analyses of the various subparts.

The conclusion of the analysis is that the benefits forthcoming (psychic as well as pecuniary) provide a substantial offset to the costs that will be incurred. The costs involved will not be as great as is widely thought and the compelling situation of some of the handicapped persons involved tips the balance in favor of proceeding with immediate implementation of the regulation.

The details of the regulation, such as wording of key phrases, precise extent of population coverage, etc, are discussed at various points in the analyses. The major issues are: alternative ways of wording the "reasonable accommodation" provision; determining the proper incidence rate for the handicapping condition. "Learning Disabled;" determining who should bear the non-educational costs associated with severely handicapped children who require a residential setting; and alternative timing and phase in strategies.

II. EMPLOYMENT PRACTICES (Subpart B)

Subpart B prohibits discrimination in employment against handicapped individuals. The principles developed under the Civil Rights Act of 1964 and the Education Amendments of 1972 were used as a basis for this subpart. Its provisions are consistent with those of section 503 of the Rehabilitation Act which requires federal contractors* to take affirmative action in the employment of qualified handicapped persons.

Although all the provisions of this subpart are aimed at the same objective--assuring nondiscriminatory treatment of handicapped workers--they differ in one important way. One group relate to the employer's recruitment, selection and promotion procedures and practices, while the other relates to the structure of the work situation and requires that employers make "...reasonable accommodation to the known physical or mental limitations of a handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship to the operation of the recipient's program." Reasonable accommodation includes adjustments like making facilities readily accessible, job restructuring, part-time and modified work schedules, acquisition or modification of equipment and devices, and other similar actions. The determination of whether an accommodation will be required (i.e., whether undue hardship exists) will be based on such factors as the size and type of the recipients operation and the nature and cost of the needed accommodation.

The provisions dealing with recruitment, selection and promotion procedures are designed to eliminate discriminatory practices without imposing any added cost (with the possible exception of minor administrative costs) upon recipients. For example, many firms and agencies make routine pre-employment inquiries about the mental and physical condition of the applicant. The proposed regulation would require that all employment application forms state that any handicap-related information requested will not in itself be used as a basis for denying employment. Also any such inquiry must be confined to job related matters and information must be kept confidential.

These provisions will especially aid those with the less visible handicapping conditions (e.g. epilepsy, diabetes, emotional problems). Many of these individuals are seriously inhibited in their job search because of the fear that they will be summarily rejected if they reveal their handicapping condition. For example, a person with epilepsy who could qualify for a better job may not apply because a minor accommodation would be required and

*The proposed regulation will apply to the recipients of HEW grants (as opposed to contracts) who are for the most part public or non-profit organizations (as opposed to proprietary firms). However there is an area of overlap with 503 since many universities receive both grants and contracts from the federal government.

he is afraid to reveal his condition. In this situation the individual's earnings capacity is reduced even though the employer might have been willing to make the required accommodation. Thus, the procedural provisions by themselves, even without additional reasonable accommodations, will produce benefits in the form of increased earnings for handicapped workers. Since the cost imposed on employers by these procedural requirements will be negligible, this part of the subpart is clearly highly cost effective.

The reasonable accommodation provision also seeks to provide benefits by breaking down the employment barriers due to ignorance and stereotyped thinking. It differs from the procedural provisions, however, in that it will require employers in some situations to incur additional costs at the outset in order for the handicapped worker to be equally productive. The phrases "in some situations" and "at the outset" are underlined to stress that for most combinations of types of handicapping condition and job category "reasonable accommodation" will require either no or only minor outlays.

For example, it might involve no more than abandoning a misconception such as thinking that hiring a person with epilepsy will raise accident insurance rates. And in situations where outlays are required it will usually involve only a minor initial investment rather than a major on-going outlay. For example, this might mean recognizing that the traditional job specifications are either outmoded or can be easily adapted to the particular type of handicap in question.

Of course there are some situations where the types of accommodations that would be required can become a source of controversy. These situations are of two kinds. One involves disease entities that may or may not be in a stabilized condition. Diabetes and cancer are the two important types that occur in practice.* Dispute can arise over what the actual probabilities of re-occurrence are and we will review the experience under section 503 in connection with this issue.

The other class of situations involves the various kinds of emotional handicaps -- psychotic reaction, depression, anxiety reaction, etc. The emotional handicaps differ sharply from the physical in how much they can be overcome by simple job restructuring and other kinds of minor accommodations. As shown below (appendix A, table 5), the effect of emotional handicaps on earnings is much greater than for many severe types of physical disabilities. It is not clear whether discrimination by employers is as major a factor in lowering earnings for the emotionally disturbed group as for the other group. In any case,

*Interview with David Brigham, Office of Federal Contract Compliance and Programs. Mr. Brigham provided information from his experience with administering section 503. (It should be noted that the Office for Civil Rights does not view this problem in terms of reasonable accommodation, but in terms of whether such a person is qualified for the job in question. The discussion of the problem is retained here and on page 11, however, because it conforms to the author's analysis of the issue.)

the applicability of most of the known types of "reasonable accommodation" would appear to be limited for those with emotional handicaps. As experience evolves, the program should be closely monitored for guidance on this issue.

The reasonable accommodation provision is likely to generate concern about possible significant cost increases. Therefore the rest of this section is primarily devoted to presenting data and survey results on the probable costs of reasonable accommodation. First, however, evidence on pecuniary benefits (attributable to the entire subpart) is also presented.

It is important to note that the cost of making buildings accessible, which is one important type of reasonable accommodation, will be covered below in the analysis of subpart C. In balancing costs and benefits for the entire regulation the reader should be careful not to double count the costs of making buildings accessible. The cost of building accessibility should be added to the non-accessibility costs of all the other subparts and then this total cost should be compared to the sum of the benefits flowing from each of the subparts (again being sure not to double count any benefits).

Benefits*

There will be both psychic and pecuniary benefits from eliminating job discrimination. Both society in general and the handicapped worker in particular will obtain some psychic benefits from the elimination of employment discrimination. The fact that psychic benefits cannot be easily measured objectively does not make them any less significant and they should be considered when the overall balance is struck between costs and benefits.

Pecuniary benefits accrue in the form of increased earnings and employment stability for the disabled workers which reflects their greater contribution to the Gross National Product.

How great are these pecuniary benefits likely to be? Given the state of existing knowledge, there is no basis for anything more than an informed guess. We estimated (see appendix A) that the regulation might affect about one million disabled workers. We also estimated that the annual earnings of partially work disabled males might be as much as 18% lower on account of employment discrimination. Combining these two estimates yields an estimate of approximately $1 billion per year in benefits via the higher earnings capacity of handicapped workers. If we halve the estimate of the effect of discrimination on earnings (to 9%) then the estimate of annual benefits is halved, etc.

*The benefit estimates are based on estimates of certain parameters that were derived from a brief analysis of available data on disability status and earnings. See appendix A for the details of this survey.

Costs Associated with Reasonable Accommodations

This part of the subpart requires covered agencies and firms to make reasonable outlays on whatever special resources are needed for full utilization of handicapped applicants. As noted above, probably the major source of cost increase associated with reasonable accommodation in employment--that of making buildings physically accessible--is covered below as a separate subpart. For most cases the only other types of accommodations that are envisaged are those that involve little more than discarding stereotypes about what impact employing handicapped workers will have on the agency or firm. One of the most widespread of these myths is that employing handicapped workers will decrease safety performance and increase disability and life insurance rates. A number of studies have shown that this is not the case.*

If an agency or firm has never employed a handicapped worker then the chances are it has not done any systematic thinking about the task content of its various job categories.** It always appears at first that someone with a dramatic physical handicap (e.g. a totally blind person) could not perform the work at the productivity level of a non-handicapped person. However many modern jobs involve primarily mental tasks and once the percent of sub-tasks that require the missing physical ability (sight, use of both hands, etc.) falls below a certain percentage, it is possible, and often simple, to restructure the job situation so that the handicapped worker can perform equally well.

Experts in the area of vocational rehabilitation stress a general principal that explains some of the surprising patterns in the data on earnings by type and severity of disability.*** The basic idea is that the variety of job situations in a modern economy combined with the great variety of forms that physical disabilities take, assures that there will be at least a few rewarding and renumerative jobs that can be very easily restructured for any physically handicapped individual. Data in appendix A on the employment of veterans show that there is relatively high earnings and employment participation among even very severely handicapped veterans. This is some indirect evidence for the general principal. More direct evidence will now be presented. There have been

*The results of several surveys are summarized in Sandra Kalenik, "Myths About Hiring the Physically Handicapped" Job Safety and Health, Vol. 2 #9, Sep 1974: and in J. Wolfe, "Disability is No Handicap for DuPont", The Alliance Review, National Alliance of Businessmen, Winter 73-74. A detailed study of the relationship between job safety insurance and hiring workers with epilepsy is Eilers and Melone, The Underwriting and Rating of Workmen's Compensation Insurance With Particular Reference to the Coverage of Employees Afflicted With Epilepsy, published by the Epilepsy Foundation, Wash., D.C.

**This was found by Wilson, et. al., in their survey study. Wilson, Richards and Berceni; Disabled Veterans of the Vietnam Era: Employment Problems and Prospects, HumRRo Technical Report 75-1, Alexandria, Va. Jan 1975.

***At least four individuals made this observation to the author: Mr. Dave Brigham, Mr. George Majors, Ms. Anne Beckman, and Mr. Edward Lynch.

a number of surveys that document what firms have done to accommodate handicapped workers. The initial experience of the Office of Federal Contract Compliance and Programs (OFCCP) with enforcing section 503 is also reviewed. Finally we present a detailed documentation of the types of jobs that have been successfully adapted to accommodate totally blind individuals.

(1) Survey Studies

We present the findings of three surveys, one by the Civil Service Commission, one by the DuPont Company and the one cited above that was undertaken to help disabled Vietnam veterans with their employment problems.*

The Office of Selective Placement of the Civil Service Commission completed a survey in August, 1970, of their placement of severely handicapped individuals in the federal government. The group studied did not include mildly or moderately handicapped persons but only those persons whose handicap was sufficiently severe to preclude their placement through regular competitive service procedures. The following description of the surveyed employees reveals that they constitute the group which is traditionally the hardest to place in employment and the one which would be expected to create the most severe problems in terms of the cost of accommodation:

> More than one-third of the appointees were deaf or had severe hearing losses. Most of the deaf were also mute. Other disabilities commonly noted were blindness, upper and lower body impairments, and amputations. More than half of the appointees had multiple impairments.

Nevertheless, very little job restructuring or work-site modification was necessary to accommodate the limitations of these employees. In terms of job restructuring, 317 of the 397 persons placed required no accommodation, 62 required some (described by the respondents as "incidental"), and 18 did not respond. Thus, of the 379 who did respond, 83.5% or 4 out of 5 required no job restructuring at all.

In terms of modification of work sites, 336 persons required no modification, 44 required some (primarily minor changes, such as adjustment of work benches), and 17 did not respond. Thus of the 380 who did respond, 86.9% or 7 out of 8 required no work site modification. The CSC report based on the survey concludes that "contrary to the general assumption, the severely handicapped do not usually, or even often, require major alterations in a job situation. When changes are made, they were such incidental things as installing a wheelchair ramp at a building entrance, rearranging desks and file cabinets to improve mobility and accessibility, etc."

*The reader is cautioned that these studies may not be representative of the universe of employers that will be covered by the proposed regulation and hence only moderate confidence in their resources is warranted. Note also that these studies deal primarily with physically handicapped persons.

Another study was conducted at E.I. DuPont de Nemours and Company. The occupations of the employees studied and the range of their handicaps, as well as the results of the study, are described in an article* published in the Alliance Review. Table 1 shows the distribution of handicapped workers by type of occupation and disabling condition. The relevant findings were that there was no increase in insurance costs and that the physical adjustments required were minimal, with most of the handicapped workers requiring no special work arrangements at all. In terms of safety, job performance measures, job stability and attendance record, the handicapped workers as a group scored higher than non-handicapped workers.

In the survey of disabled Vietnam era veterans (which included a large fraction of severely disabled veterans) a question was asked each veteran about what special accommodations (if any) were made by their employer. Only 11% of the veterans who had held a job in 1973 reported that any special accommodation was made at all.** Table 2 presents a distribution of the accommodations reported by type of special arrangement. The authors of the study based on this survey conducted extensive content analysis of all the responses they received. They concluded that:

> "As the tables show, most of the special arrangements make minimal demands on, or entail minimal costs to the employer...even in cases where the employer provided special equipment the cost seemed to be minimal....."***

(2) OFCCP Experience with Section 503

OFCCP has the responsibility for enforcing non-discriminatory employment of handicapped individuals by all employers who receive contracts from the federal government. The 503 regulation is similar to subpart B of the proposed regulation except that it also requires that affirmative action be taken. It is generally agreed that affirmative action can

*Wolfe, "Disability Is No Handicap for DuPont," Op. Cit.

**This low percentage may not neccessarily be a good sign overall. It might reflect lack of effort on the part of some employers as well as lack of necessity. This data set also contains a question on perceived discrimination (see appendix A, table A-9) but the authors did not present any tabulations which crossed the response on the accommodation question with the perceived discrimination response. If they were uncorrelated then the low overall percentage who reported receiving any special accommodation would be unambiguously a good thing.

***Wilson, Richards and Bercini, Op. Cit., p. 156.

TABLE 1

HANDICAPPED EMPLOYEES OF DUPONT CO. BY OCCUPATION AND TYPE OF DISABILITY (PERCENT DISTRIBUTIONS)

OCCUPATION

(Total number. . . . . 1,452)	
Professional, Tech. & Mgr.	23.0%
Craftsmen	38.7
Operatives	16.0
Clerical & Kindred	15.4
Laborers and Service Wks	6.8
	100.0

TYPE OF DISABILITY

(Total number. . . . . 1,459*)	
Nonparalytic Ortheopedic	28.4%
Heart Disease	26.0
Vision Impairment	19.0
Amputation	11.2
Paralysis	7.3
Epilepsy	3.8
Hearing Impairment	2.9
Total Deafness	.9
Total Blindness	.3
	100.0

*Some employees have more than one handicap.

Source: Wolfe, "Disability Is No Handicap for DuPont," Op. Cit.

imply a significantly higher level of extra effort than implied by the concept of reasonable accommodation. Thus the use of the 503 experience as a guide to what will happen under 504 is clearly conservative in that 503 will, because of its affirmative action provision, lead to larger costs than will be necessary under 504.

Mr. David Brigham of OFCCP provided detailed information on what the early experience under 503 has been. Their procedures recommend a sixty day "cooling off" period during which a potential complaint is discussed between only the employer and the handicapped worker. Mr. Brigham reported that the large majority of complaints have been disposed of during this cooling off period without having required any hearings before federal officials. A total of 331 complaints have thus far not been resolved during the cooling off period and have reached the level of arbitration before OFCCP officials. It follows therefore that these 331 complaints represent predominantly serious situations. The average situation over all workers who initiate complaints will be much less serious and costly.

TABLE 2

CATEGORIES OF SPECIAL JOB ARRANGEMENTS MADE BY EMPLOYERS, AND PERCENT OF VETERANS REPORTING ARRANGEMENTS IN EACH CATEGORY*

Special Job Arrangements	Percent	N
Flexibility of hours	18	56
Extra rest breaks	16	49
Assigned to appropriate job in the first place	16	49
Regular duties but no lifting	13	40
Change of duties or transfer of job	10	31
Special equipment	8	24
Work at own pace	7	22
Special parking	5	16
Help from supervisor or others	4	12
Miscellaneous	2	5

*Based on a content analysis of 304 randomly selected job arrangements reported by disabled veterans in response to the question, "Did your employer make arrangements so that you could work with your disability? (For example, extra rest periods, special parking, special equipment for doing the work, change of job duties, help from supervisor)."

Source: Taken from Wilson, Richards and Bercini, Op. Cit. p. 155, table V-11.

Mr. Brigham said that almost all of the difficult cases to date fall into two categories. One involves disabilities caused by disease entities that have not obviously stabilized--cancer, diabetes, etc. Here the position of OFCCP has been that if the person is qualified at the present time then the burden of proof is on the employer to show that the costs of the unexpected recurrence of the disease entity (e.g. costs of providing a new worker with break-in training) are so high as to make the accommodation unreasonable. Mr. Brigham noted that the crucial factor in determining whether the cost imposed would be unreasonable is the size of the firm and the proportion of total employment cost that the extra cost would constitute.

The other problem area are cases associated with emotional handicaps. How to define reasonable accommodation in these situations requires difficult judgments. A related issue is that of determining whether the complaining person really considered himself a handicapped person of if he is just using the handicap as a way of saving a job that he (she) is being dismissed from on other grounds.

(3) Jobs and Accommodations for Blind Individuals*

Since World War II there have been a number of very detailed surveys of the employment situations of totally blind veterans. Many studies of job restructuring aimed at opening up jobs for blind people are readily available. The most well known judicial decision on what constitutes reasonable accommodation also involves a blind individual. Thus, the information about adjustments required for people who are totally blind, which is a very severe disability, can be used to illustrate in detail what reasonable accommodation might entail in practice.

The court case involved a blind teacher in upstate New York. The New York State education law contains a regulation that specifically forbids school administrators from laying off a teacher who goes blind as long as the handicap does not interfere with his ability to teach. In his argument** the judge reasoned that blindness in and of itself does not impair the faculties required to be an effective teacher (i.e., ability to organize material for presentation, present it orally before the class, etc.) so that the law required that the school system supply the teacher with whatever special resources were necessary to carry out the ancillary functions of paper grading, calling on students who raise their hands, etc.

*Mr. George Majors, Office for the Blind and Visually Handicapped (HEW), was interviewed in connection with this section. He and his staff provided the references cited herein.

**Bevan vs. N.Y. State Teachers Retirement System, 345 N.Y.S. 2d. 921.

What does the extra cost of employing a blind teacher actually amount to in practice? In the school year 1968-69 there were 334 blind teachers working in elementary and secondary schools in the United States.* Dr. Edward Huntington did a study based on questionnaire and personal interviews with some of these teachers and with the school administrators in the systems where they worked.** He questioned administrators on eight potential problem areas: lunchroom supervision; administering tests; study hall supervision; chaperoning student activities; use of visual aids; fire drills; keeping written records; and discipline. For all the categories Dr. Huntington found that either the blind teacher could do what appeared at first to require sight (e.g., lead children out of the building at fire drills), or that compensating substitutions could be made between the different categories (e.g. taking on more monitoring duties like study hall and dances instead of lunchroom supervision). Discipline turned out not be the problem that had been expected. However, Dr. Huntington does mention the caveat that there is still some disagreement about the feasibility of blind teachers in elementary schools. The amounts of extra resources that the average blind teacher requires were very minor -- a braille typewriter and a cassette tape recorder for keeping written records and the occasional use of an honor student to help proctor examinations and then read the answers into a tape recorder.

In sum, Dr. Huntington's analysis suggests that the only area of controversy in deciding what constitutes reasonable accommodations for blind teachers is the question of the age of the students. Clearly the issues of discipline and effective pedagogy (is it important educationally for the teacher to be able to see the young child's reaction?) could be important at the lower elementary grade levels. However, Dr. Huntington's analysis also shows that there will be no problems in enforcing reasonable accommodation for blind teachers at the secondary and college level.

Table 3 shows how a sample of totally blind veterans were distributed by types of job.*** The very uneven distribution of the totally blind by type of work suggests that the enforcement of reasonable accommodation will have to be very flexible -- not all jobs can be easily adapted to lack of sight although the range of possibilities that turns up in practice is truly surprising.

*Employment of Qualified Blind Teachers in Teaching Positions in the Public School Systems at Both the Elementary and the Secondary Grade Levels, Report Presented by The New York Association for the Blind, 111 East 59th Street, New York, New York 10022, March 1969. Tables I and II, pp. 50-55.

**Dr. Huntington presents a summary of his findings in Employment of Qualified Blind...., Ibid, pp 42-45.

***Occupations of Totally Blinded Veterans of World War II and Korea, prepared by the Dept. of Veterans Benefits, VA pamphlet 7-10, Va., Washington, D.C., 1956.

TABLE 3

DISTRIBUTION OF JOBS OF 338 TOTALLY BLIND VETERANS AMONG DOD PART IV CLASSIFICATIONS
(Percent distribution)

	Percent	
Professional, Technical, and Managerial Work (147)		37.9%
Musical work (4)	2.7%	
Literary work (7)	4.7	
Public service work (27)	18.3	
Technical work (17)	11.5	
Managerial work (92)	62.5	
	100.0	
Clerical and Sales Work (54)		13.9
Recording work (4)	7.4%	
General clerical work (3)	5.5	
Public contact work (47)	87.0	
General public contact (15)	100.0	
Selling (32)		
Service Work (6)		1.5
Farming (48)		12.3
General farming (18)	37.5%	
Animal care (28)	58.3	
Fruit farming and gardening (2)	4.1	
	100.0	
Mechanical Work (37)		9.5
Machine trades (8)	21.6%	
Stone or glass machining (1)		
Mechanical repairing (7)		
Crafts (29)	78.3	
Electrical repairing (8)	100.0	
Bench work (11)		
Inspecting and testing (2)		
Photographic work (8)		
Manual work (96)		24.7
Observational work (5)	5.2%	
Manipulative work (70)	72.9	
Benchwork (Assembled and related) (45)		
Machine Operating, manipulative (25)		
Elemental work (21)	21.8	
	100.0	100.0

Source: Occupations of Totally Blinded..., Ibid., p. 6.

The study based on this survey lists in detail the arrangements and accommodations surrounding each of the 388 job situations. It is difficult to summarize this material in that the specific types of minor devices, task restructuring and use of sighted individuals is so diverse. In the professional public service and managerial areas the part time assistance of a graduate student (or other secondary worker--wife, elderly part time worker, etc.) is usually the only extra resource required (when any are required at all). In the employment and clerical field the accommodation usually involves only minor job restructuring to allow the blind clerk or secretary to specialize in those parts of the office information network that do not require immediate sight -- e.g., handling information received over the phone and stored in dictaphones as opposed to processing written information left in in-boxes that require immediate response.

Recent developments in job restructuring technology suggest that the clerical area is going to become a more important source of employment for blind individuals. The general area is called "Information Service Processing" and includes such jobs as social security service representative, vehicle dispatchers and starters, estimators and investigators, etc.*

Precise Wording of the Reasonable Accommodation Provision.

Our analysis strongly suggests that in the large majority of cases enforcement of reasonable accommodation will not result in any significant cost increase for employers. However, some of the material covered indicated that there are situations in which accommodation would, except for very large agencies and firms, require significant financial outlays, and/or risks and disruptions. This suggests that thought should be given to alternative ways of wording the provision. One approach possible would be to define reasonable accommodation as a percent of some economic factor such as the total wage bill or per employee costs. No completely satisfactory solution has yet, however, been devised.

*Louis Vieceli, Guidelines for the Selection, Training, and Placement of Blind Persons in Information Service Expediting, Rehabilitation Institute, Southern Illinois University, Carbondale, Illinois, June 1975.

III. PROGRAM ACCESSIBILITY (Subpart C)

Subpart C prohibits the exclusion of qualified handicapped persons by reason of the inaccessibility of a recipient's facilities; it applies to all programs and recipients covered by the proposed regulation. Two standards are established for program accessibility -- one for new construction and alteration (84.23), the other for existing buildings (84.22).

Under section 84.23, new construction and design must, at a minimum, meet the standards for barrier free construction established by the American National Standards Institute (ANSI). Any alteration of existing buildings which is undertaken must also conform to the ANSI standards if the alteration involves work on a portion of the facility which is covered by the ANSI standards, such as toilets, elevators, stairs, and curbs. All federal and federally assisted construction is subject to virtually identical requirements under the Architectural Barriers Act, P.L. 90-480; public buildings are subject to similar requirements imposed by state law in forty-eight states.

Under section 84.22 (existing facilities) each program or activity, when viewed in its entirety, must, within three years of the effective date of the regulation, be physically accessible to handicapped persons. Because of the flexibility allowed by the regulation, it is expected that most recipients will be able to achieve compliance by altering, at the very most, only one-third of their existing buildings.

The following presents a range of estimates of the cost of compliance for existing facilities. Although the estimates lack precision, they do give some idea of the magnitude of the costs which will be incurred. After presenting cost estimates, the sources of benefits are indicated and alternatives are considered.

Cost Estimates

New Construction

The Office of Facilities, Engineering and Property Management (OFEPM), HEW, recommends that for budget purposes the cost of barrier-free construction should be estimated at one-half of one percent of the total project cost. Other estimates vary from one-tenth to one percent. The most commonly accepted figure is, however, the one recommended by OFEPM. This low percentage increase, together with the existence of partially duplicative state and federal requirements, renders the economic impact of this provision insignificant.

Existing Facilities

The total estimated cost of altering enough existing facilities to meet the standard of program accessibility is between $216 - $475 million, or an annualized cost of $50 million.* The method of arriving at these figures follows.

Elementary and Secondary Schools. If all buildings were required to be completely accessible, we estimate that $458 - $1,000 million would be needed (see table 4). However, because of the flexibility allowed in attaining compliance it appears reasonable to assume that, at most, only one-third of this total would be needed -- $151 - $333 million.

Only about 10% of all elementary and secondary school children are handicapped** and a much smaller percentage (probably not exceeding 1%) have those kinds of physical handicaps that require special modifications of buildings. Thus, most recipients should be able (by providing the required transportation) to assign all of their physically handicapped children to either new or already accessible existing facilities. For example, even a moderate size local system (say with only 5 - 10 separate buildings) with no new or already accessible buildings, should have to modify only one or two of its buildings. Similar percentage factors and reasoning apply also to the schools viewed as employees of adult handicapped individuals. Thus, the cost estimates based on our assumption of one-third appear to be very conservative - i.e. they are definitely upward biased.

Higher Education. If all buildings of institutions of higher education were required to be completely accessible, we estimate that $198-$432 million would be needed for that purpose (see table 4). Applying the same very conservative one-third assumption used for elementary and secondary schools, the costs would be in the range $65-$142 million.***

*The larger figures represent costs that are "one-time outlays" which must be "annualized" before they can be compared with perpetual benefit flows like the increase in annual earnings estimated in Section II. "Annualization" involves factors like annual maintenance outlays and the rate of return that could be earned if the funds were invested elsewhere.

**An analysis of special education proposed by Mr. Howard Bennett (Office of Civil Rights) suggests that the proportion may even be lower than 10%. See Special Education, Office of Civil Rights, March 17, 1975.

***This does not cover non-degree granting post-secondary schools. These consist primarily of proprietory vocational schools, and hard data on numbers of students enrolled, etc., is hard to come by. This ommission will add a source of downward bias to our estimates but it is unlikely to be larger than the offsetting upward bias caused by our one-third assumption.

TABLE 4

CALCULATIONS OF ESTIMATED COSTS OF REMOVING ARCHITECTURAL BARRIERS IF ALL BUILDINGS WERE REQUIRED TO BE ALTERED

Elementary and Secondary Schools		
1. Estimated value of school property (71-72)[a]		$88.5 Billion
2. Low-side estimated percentage cost to remove barriers by alteration[b]		.517%
3. High-side estimated percentage cost to remove barriers by alteration[c]		1.13%
4. Estimated cost of removing barriers by alteration if all buildings needed alteration	--- (2) x (1)	$ .485 Billion
	--- (3) x (1)	$ 1.000 Billion
Institutions of Higher Education		
5. Estimated value of school building property (71-72)[d]		$38.2 Billion
6. Estimated cost to remove barriers by alteration if all buildings needed alteration	--- (2) x (5)	$ .198 Billion
	--- (3) x (5)	$ .432 Billion

Notes and Sources:

[a] Obtained from data reported in National Center for Educational Statistics Survey 75-153, pp. 72, 38 and 40. The basis of the value reported by schools is the historical cost of the original construction plus any improvements made to date. Because of inflation, the actual current replacement cost of buildings (and presumably the current cost of modifying them) will exceed their book value with the excess being greater the older the building and the greater the average rate of inflation since its construction. This will be another source of downward bias in our cost estimates. Although it is not possible to determine the magnitude of the bias, it also appears likely that it will be outweighed by the upward bias contained in the one-third assumption.

[b] Based on the average of two HEW accessibility projects that were surveyed by GAO. See p. 89 of "Further Action Needed to Make All Public Buildings Accessible to the Physically Handicapped," Comptroller General of the U.S. Based on GAO Report FPCD 76-166, July 1975.

[c] Same as (b) except that it is the figure reported for an average of seven governmental projects surveyed

[d] NCES Survey 75-114, p. 102.

Hospitals and Nursing Facilities. Many of these facilities are already subject to the ANSI standards through Federal regulation and state laws dealing with access of disabled people to public facilities. Because recipients who provide health services are accustomed to handling clients whose mobility is impaired, it is assumed that their facilities are, for the most part, already accessible. The proposed regulation should not, therefore, impose significant additional costs on these recipients.*

Welfare and Rehabilitation Service Buildings. Various regulations (including 45 CFR 128, to be effective 10/76), as well as general policy, require case workers to give services or determine eligibility wherever necessary. Thus, if the client or potential client is unable to go to the building where the service is performed, the case worker must go to the client's home. Because this approach to creating program accessibility is permitted by the 504 regulation, no significant additional costs will be incurred by these recipients.

Table 5 presents a summary of our estimates of the range of possible cost increments.

TABLE 5

ESTIMATES OF COST INCREMENTS FOR MAKING ALL EXISTING FACILITIES ACCESSIBLE
(Millions of dollars)

Type of facility	Low side	High side
Elementary and Secondary School	151	333
Higher education	65	142
Hospital and nursing	0	0
Welfare and rehab service	0	0
Total	216	475

Source: See text discussion.

*It has not yet been decided whether individual doctors who are reimbursed under Medicare and/or Medicaid are considered recipients and thus covered by the proposed regulation. However, even if they are, it does not appear likely, given the flexibility allowed in attaining compliance, that significant costs will be imposed on individual participants. Many are located in already accessible medical buildings and others will be able to comply by making house calls, referring to doctors with accessible office facilities, scheduling physically handicapped patients in groups at accessible facilities, etc.

Benefits

Increased building accessibility will generate benefits in three areas: (1) reduced costs of providing elementary and secondary education to some handicapped children; (2) increased lifetime earning capacity of those additional handicapped youngsters who will now go on to college and (3) the increased earnings capacity of handicapped workers who can now find better employment of their skills in jobs located in newly accessible buildings.

Each of these areas is also the subject of its own subpart -- elementary and secondary education (subpart D); higher education (subpart E) and employment (subpart B). The total amount of benefits for each of these areas will be the sum of the benefits produced by both the physical accessibility provisions of this subpart and the other (non-accessibility) provisions of each specific subpart. Thus in subpart B above we estimated that the total amount of pecuniary benefits from all the provisions influencing employment discrimination (i.e. procedural provisions, non-accessibility accommodations and accessibility accommodations) might be as much as $1 billion per year. Similarly in our analyses of subparts D and E below we will include the effects of both the accessibility provisions of this subpart and the other non-accessibility provisions of each of those subparts. In the concluding section, the costs of this subpart are added to all the non-accessibility costs associated with the other subparts and this grand total is balanced against the sum of the benefits of all the other subparts.

Alternatives

Possible alternatives range from requiring the immediate modification of all of the recipients' existing facilities to limiting the regulations coverage to new construction. The approach finally decided upon, which allows recipients to keep costs minimal by using methods other than physical alteration of all building, was believed to constitute the most equitable balance between the interests of excluded handicapped persons and those of recipients. The cost estimates shown above, when combined with evidence presented elsewhere on the magnitude of the benefits that will be generated, lends support to this decision.

IV. ELEMENTARY AND SECONDARY EDUCATION (Subpart D)

Subpart D of the proposed regulation sets forth nondiscrimination requirements applicable to recipients which operate preschool, elementary, secondary, and adult education programs. Under its provisions no handicapped child may be denied a public education, nor may such a child be excluded from the regular education program unless suitable alternative education is provided at public expense. In the latter case, the burden of showing that placement outside the regular setting is in the best interests of the child is placed upon the recipient (sec. 84.35); the child and his or her parents or guardian may object to the placement and have the right to an impartial hearing if they do so (sec. 84.36(e)). If it is determined that the child's interests will be best served by placement in a program other than the one operated by the recipient, then the recipient must pay full tuition, and, if incurred, any room and board, and transportation costs of that placement (sec. 84.34).

It is expected that these provisions, together with the standards established in the regulation for preplacement evaluation (sec. 84.36(c)), will result in a greater proportion of handicapped students being placed in the regular school setting. Whether placement is made to regular classes, special classes, or outside the recipient's program, the regulation requires that the education provided be as adequate, in terms of meeting the needs of the handicapped child, as is provided to non-handicapped children (sec. 84.36(a)).

Other provisions of Subpart D require public schools to locate handicapped children who are not presently in school (sec. 84.33) and, within one year of the effective date of the regulation, to provide nonacademic and extracurricular services without discrimination on the basis of handicap (sec. 84.37). Where applicable, the subpart applies to private as well as public schools.

In order to analyze the effects of this subpart, it is important to understand the context of judicial and legislative developments in which it will operate.

Background and Plan of Analysis

Table 6 presents data that indicate the broad outline of trends in special education in the United States. Since the end of World War II there has been a steady up-trend in various indicators of the coverage and effectiveness of special education, such as in the proportion of all handicapped childred served, amounts of resources spent per student, and proportions served in the less restrictive type settings. These broad trends in amounts and types or resources both reflect, and have themselves influenced, developments in the courts and the State legislatures regarding the legal status of the handicapped child's right to an equal education.

Recent landmark decisions* have made it clear that handicapped children have a constitutional right to public educational resources regardless of their degree of handicap (so

*The two most often cited cases are: Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971) and 343 F. Supp. 279 (E.D. Pa. 1972); and Mills v. Board of Education of District of Columbia, 348. R. Supp. 866 (D.D.C. 1972).

TABLE 6

TRENDS IN SPECIAL EDUCATION: NUMBERS OF HANDICAPPED CHILDREN SERVED AND THE PERCENT OF ALL HANDICAPPED CHILDREN BEING SERVED** IN SELECTED* CATEGORIES: 1966-1975

Type of Handicap	1966		1972-73		1974-75***	
	Number of children	Percent of total	Number of children	Percent of total	Number of children	Percent of total
Speech impairment	989,500	56.3	1,383,000	76.7	1,729,750	81.0
Mentally retarded	540,100	46.8	900,000	80.5	1,168,750	83.0
Emotionally disturbed	87,900	12.0	199,000	19.3	215,050	18.0
Crippled or other health	69,400	18.4	233,000	86.7	219,725	72.0
Deaf	23,500	47.0	28,000	71.6	32,725	71.0
Hard of hearing	27,800	11.1	55,000	21.4	56,100	18.0
Visually handicapped	23,300	46.6	28.000	54.8	36,465	59.0
TOTAL	1,761,500	40.3	2,816,000	61.8	3,458,565	78.8

*Two legal handicapping conditions "Learning Disabilities" and "Multiply Handicapped" have been left out of the trend comparison. Learning disabled is a relatively recent and controversial category (it was not used by researchers or policy people in 1966) while comparable data for the multi-handicapped are just not available for 1966.

**The age groups covered differs slightly across the three time periods. In 74-75 it was 6-19; in 72-73 it was 5-17; and in 1966 it was probably 6-19.

***The figures for 74-75 are based on very preliminary data and are not as reliable as the figures for the other two years. Figures on the actual distribution of served children by handicapping category were not yet available so they were estimated by applying the 72-73 percentage distribution factors to the 74-75 total of served school age children 6-19.

Sources: 1966 figures from R. Mackie, Special Education in the United States: Statistics 1948-60, Teachers College Press (New York 1969). Numbers of served children were obtained by a direct mail survey

of all known public and private (day and residential) schools serving handicapped children. Estimates of total incidence that were used were obtained by combining information from a variety of sources including State Education Agencies, National Organizations, etc. Estimated incidence rates used were: SI=3.5%, MR=2.3%, ED=2.0%, Cr·H=1.5%, D=.1%, HH=.5%, VH=.1%.

1972-73 figures were reported in Kakalik, et. al., Services for Handicapped Youth: A Program Overview, RAND Corporation (Santa Monica 1973). Report #R-1220-HEW. Estimates of the total number served taken from SEA annual reports submitted to HEW. Estimates of total incidence based on data from a variety of sources. Incidence rates used were: SI=3.5%, MR=2.3%, ED=2.0%, Cr·H=.5%, D=.075%, HH=.5%, VH=.1%.

1974-75 figures are based on data supplied by the Bureau of Education of the Handicapped, HEW. Estimates of total numbers served obtained from SEAs annual reports. Estimates for the total served by handicapping condition were obtained by distributing the total served (age 6-19) according to the percent distribution that existed in 72-73. Estimates of total incidence were obtained by combining data from various sources. Incidence rates used were: SI=3.5%, MR=2.3%, ED=2.0%, Cr·H=.5%, D=.075%, HH=.5%, VH-.1%.

called "0 reject rule") and also that these resources shall be in an amount and delivered in a setting that will, in totality, provide the handicapped child with equal educational opportunity.

At the present time, most states have already passed legislation mandating that all the local school systems must provide sufficient educational resources to all the handicapped children in their districts. In addition, the Federal government has just enacted legislation that will, over the next few years, significantly increase the share of special education expenditures that the Federal government will pay for. This legislation (Public Law 94-142), also requires, as a condition for receipt of Federal aid, that the State provide free and adequate education to all handicapped children.

Thus, the proposed regulation will not be the sole means of achieving the goal of equal educational opportunity for all handicapped children. Rather, it will be one of a number of powerful forces all advocating approximately the same objective.* The role of HEW in enforcing this subpart can, therefore, be viewed as one of hastening and helping to enforce full compliance with the goal of equal educational opportunity for all handicapped children.

This role of hastening compliance should not be considered a relatively unimportant one. Experience in the District of Columbia and other areas which have been subject to court orders suggests that local agencies may take very long periods of time to actually comply unless they are faced with strong incentives to do so. Moreover, State legislation mandating full coverage is one thing, while actually appropriating the needed funds at the State and Local level is quite another. Thus, the potential for the regulation to make a significant net contribution is very real.**

We will develop our analysis of the cost and benefits that the regulation will help to produce in terms of various sub-groups of children and situations. Benefits and costs associated with each of the sub-groups are of a different character and also differ in the degree to which there could be differences of opinion as to the balance of costs and benefits. After a summary that brings together all the costs and benefits a brief discussion of the costs of alternative phasing in strategies is presented.

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*Sections of Public Law 94-142 cover most of the same ground as Subpart D of the proposed regulation. The only significant difference is in regard to the coverage of non-educational costs associated with residency situations. PL 94-142 does not explicitly state that non-educational costs associated with children in resident schools must be covered.

**Also it should be recognized that hastening of compliance itself has a cost vis a vis allowing a less rapid phase in. PL 94-142 allows states until September 1, 1978 to reach the goal of complete coverage of all children between the ages 3-18, and 1980 for children 3-21. The regulation follows the same schedule, except that there is no delay for children who are within the state's regular school age interval.

Sub-groups of Children

The children affected by this regulation vary along two crucial dimensions: (1) the degree and type of handicap they have and (2) the degree to which there exist effective advocates for them in the process of testing and screening, which in turn is often the determinative factor in whether or not they will be classified as handicapped and what type of special education setting they will end up in.

For children who have moderate and borderline degrees of handicap and whose families provide strong protection against mislabelling and misassignment, the main issue is that of obtaining (in a reasonable time frame) the appropriate amounts of additional special education resources from the public purse. Parents of handicapped children form a numerical minority in the political arena and even when educated and highly motivated to help their children cannot always bring the required political pressure to bear on State and Local legislatures to authorize the amount of funds required.

At the other extreme are children who have very severe or profound handicaps (e.g., a youngster who scores less than 30 on the IQ test) and who, for one reason or another, lacks the personal advocate necessary to insure that they will obtain appropriate residential care and educational services. For these children (a much smaller group than the first) the issue is much more basic -- absolutely assuring that this group always obtain decent and humane residential surroundings as well as access to meaningful educational experiences.

Finally, there is a third group of children who range in degree of handicap from being on the borderline of needing a residential setting to actually having no real handicap at all, and who lack strong parental advocates to protect them from mislabeling and misassignment abuse by the system. This group contains large numbers of de facto non handicapped children from disadvantaged backgrounds who have difficulty performing on standardized tests and/or have frequent disciplinary episodes. This group shares with the first group the general problem of obtaining adequate amounts of special education resources. However for most of these children (especially those who do not really have handicapping conditions) the major issue is that of mislabeling and misassignment. For them the regulation's detailed due process and evaluation provisions (including the requirements of multiphasic testing and screening and periodic re-examination) and its emphasis on special education being delivered in the least restrictive setting possible can be vital. For example, it can mean the difference between an inappropriate assignment to a residential setting vs. obtaining special education in a regular school by spending part-time in a special class and part-time in a regular class. As shown below there is evidence that the negative impact of inappropriate institutionalization on a child's subsequent life chances (including lifetime earnings capacity) can be dramatic.

Cost-Benefit Analysis

The main source of pecuniary costs will be from extending special education services to handicapped children who are not now receiving any kind of special education. There will also be some shifts in the burden of the pecuniary costs of special education that will result from some parents shifting their handicapped children from private programs, where the parents pay part or all of the costs, into fully funded public programs.

There are a number of important sources of pecuniary benefits. One is the reduction in costs that will be generated by the requirement that handicapped children receive their education in the Least Restrictive Setting (LRS) possible. Another source of cost reduction will be in the non educational costs of maintaining severely and profundly handicapped individuals. The other important source of pecuniary benefits is the subsequent increase in the earnings capacity of both handicapped children and the non-handicapped children who escape mis-labeling. Sources of non-pecuniary benefits are the greater life satisfaction obtained by the children as a result of improved education and the general satisfaction obtained by us all from having helped to improve greatly the life situation of less fortunate individuals.

Details of these costs and benefits are now presented for our three sub-groups.

Severely and Profoundly Handicapped. The two important handicapping categories for which this issue is significant are mentally retarded and emotionally disturbed. Hobbs* reports that there currently are about 60,000 mentally retarded children of school age in residential institutions. The number of institutionalized emotionally disturbed youngsters is not easy to ascertain but it is likely to be significantly in excess of the number of institutionalized mentally retarded children. The latest estimates by the Bureau for the Education of the Handicapped indicate that as of FY 1974-75 there were about 1 million emotionally disturbed youngsters who were not receiving any special education resources. And it is probable that some significant proportion of these youngsters were in some kind of residential institution.

The thrust of the major recent court decisions on the right to education by the handicapped makes it clear that regardless of the nature or severity of handicap the State education authority is directly responsible for providing amounts of educational resources that are appropriate to the child's capacity. This is sometimes called the "zero based reject policy," and is one of the objectives that the proposed regulation will seek to promote by adding the weight of its enforcement potential to the enforcement power of the courts. The need for the additional enforcement power appears particularly urgent for this subgroup of children, and before presenting the cold facts and figures on costs it might be well to point out some of the reasons for this special concern.

*Nicholas Hobbs, The Futures of Children, (Jossey-Bass, Washington, D.C., 19[illegible]) p. 142

Students of social programs for the handicapped and other disadvantaged groups stress the importance of the personal incentives and attitudes of the administrators of institutions in determining the amounts of resources and the quality of treatment actually received by disadvantaged clients.* The reason that it is felt urgent to make State Education authorities directly responsible for educating the severely handicapped is that the traditional state administrators of the residential institutions that serve these children are not as strongly motivated toward delivering these types of resources. There still exists some debate over what benefits are actually obtained from education resources in the case of some very severely handicapped children. Thus, it is clearly in the best interests of the children to have an agency that believes in the efficacy of the treatment be the ones who are also responsible for struggling to obtain the funds, buy the resources, have them applied, etc.

The situations that existed before the court rulings in Pennsylvania and the District of Columbia, not two states that are noted for harsh treatment of the disadvantaged, also sharply demonstrate that the fate of these children cannot be left to the goodwill of just any administrator in the State bureaucracy. In Pennsylvania the officials who are overseeing the implementation of the Court order found that there were about 4,000 school age children in the nine State institutions for the mentally retarded in 1972. Of these about 2,500 were not being provided any kind of training or educational services at all. These were all children with IQ's in the severely and profoundly retarded range (IQ less than 30).** Previous to the court's decision the State welfare authority had responsibility for the education and other needs of all children placed in these institutions. Since the court decision, which placed the authority for the education of these children with the State Department of Education, all have been receiving some form of educational services with ever increasing percentages actually being taken to a classroom setting off-grounds.***

Assuming that we can expect that the key State administrators will be strongly motivated to deliver resources, the next issue is what amount of resources will be required? State specialists in education of the handicapped were queried as to the cost of providing

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*Hobbs, Ibid., Chapter 5.

**It was found that about 1500 children were being provided some form of educational services. However, it was also found that these children all had IQ's high enough to have benefited from special education in a non-institutional setting. This case is discussed again in connection with documenting the significance of the mislabeling problem.

***Telephone interview with Dr. Gary J. Makuch Assistant Commissioner for Special Education, Pennsylvania Department of Education, December 2, 1975.

educational services to the severely handicapped children in residential settings.* The consensus was a figure of about $5,000 per student per year. The word educational is underlined to stress that the $5,000 does not cover the cost of normal maintenance (food, clothing, shelter) and other non-educational activities that are required by the institutionalized child. This is a point that could develop into an important source of controversy.

The proposed regulation as now written states that a free education must be provided and will include provision by the State of non-medical care and maintenance (food, clothing, etc). It is not clear if it is meant that the State Education Agency must bear these non-education costs or that they can be allocated to any State agency's budget, just as long as they are provided to the child without any cost to his family.

From the point of view of the child and his family it makes little difference what State agency is made to absorb the cost as long as it does not have to pay them. However, from the point of view of insuring that educational services keep reaching the most helpless and deprived of the severely handicapped children (e.g., those with no family at all or very poor parents) it may be wise to require that the State education agency only be made to pay the special education costs associated with these children and have the State welfare office mandated to pay any non-educational costs incurred on account of their need for a residential setting. This is because the whole effort may run the danger of becoming very controversial if, because of the way it is administered, the State ends up paying the non-education costs of handicapped youngsters from non-poor families. If the State welfare agency is left with the responsibility for these non-education costs then it is likely that some special means tested formula will be set up under which a more equitable distribution of the burden by income class will develop.

On the benefit side there is the possibility for both psychic and pecuniary gains. The sources of the benefits are the increased capacity for enjoying life on the part of the youngster as well as the possibility of reducing the cost of supporting the youngster if he can learn to care for his bodily and personal needs such as dressing himself, feeding himself, shopping for himself, etc. Data presented by Conley** suggest that the annual cost of maintaining a severely retarded person, over and above the cost of his food, clothing and other normal consumption expenditure, was about $3,500 in 1970.

*Telephone interviews with Ms. Lucile Anderson (Virginia Department of Education), Mr. James Keim (Maryland State Department of Education) and Dr. Makuch.

**Ronald W. Conley, The Economics of Mental Retardation, (Johns Hopkins University Press, Baltimore and London, 1973) p. 297-298.

This primarily reflects the salaries of the many attendants that are required to assist the severely retarded person in taking care of all his basic bodily and personal needs. If educational/training services enable a severely retarded person to do without these attendants, then a cost/benefit ratio of 1 or greater is highly likely. Thus, if six years of education/training are required (at $5,000 per year) to produce this capability, and if the individual lives for more than 15 years after completing the training, then, the ratio of discounted benefits ($3,500 annually) to costs will start to exceed unity, if we use a reasonable range of discount rates.*

Can the severely and profoundly retarded be given this capability by receiving education/training type service as children? Given time limitations a search and survey of the child development literature was not feasible. Phone interviews with a number of State education department specialists elicited the opinion that they can produce this effect.

Children Vulnerable to Mis-Labeling. The major current concern of specialists in the area of education of handicapped children is the negative effect that the very process of labeling and assignment to identifiable special classes may be having on handicapped children.** This growing concern has resulted in an acceleration of the "Mainstreaming" movement -- i.e., the placing of handicapped children in the absolutely least restrictive setting possible. Another effect of this concern has been to focus even greater attention on the issue of mistaken diagnosis and the resulting compounding negative effect on the child's life chances.

Most of the major court decisions have spelled out in detail the type of testing, screening and mandatory re-examination procedures that must be followed by state school administrators in determining whether a child is handicapped or not and if so what type and degree of severity. The proposed regulation seeks to hasten the achievement of this objective in all states and thus decrease the total amount of mis-diagnosis and mis-assignment generated by the system.

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*The formula for the present value of a perpetuity of $(a) per year is

Present Value = $(a)/i

where i is the discount rate. For streams of benefits that continue for more than 15 years this simple formula gives a good approximation to the exact value which is given by

$$\text{Present Value} = \$(a) \sum_{t=1}^{n} 1/(1+i)^t$$

when n is large. n is the actual number of years that the benefit continues.

**Hobbs, Op. Cit., Almost the entire book is devoted to this issue.

Reductions in mis-diagnosis and misassignment will yield benefits in the form of increased lifetime earnings capacity and increased life satisfaction of the children involved. There will also be benefits in the form of savings in the cost of special education from the increased amount of mainstreaming. Positive costs will be generated by the greater amount and quality of testing and screening procedures that will be required. No attempt is made to estimate these costs. They do not appear to be of any magnitude that would become oppressive to a school system. We do attempt however to get some idea of the order of magnitude of the benefits (including the reduction in special education costs). They appear to be potentially significant and they constitute one important offset to the costs generated by other parts of this sub-part and other sub-parts of the regulation.

A number of facts suggest the widespread existence of mis-diagnosis and misassignment. One striking example is provided by the facts uncovered in the landmark Pennsylvania case discussed above. It was found that approximately 37 percent of the instutionalized population of mentally retarded school age children scored in the IQ range between 40-75. Children who score in this range (and do not have any other traits that make the diagnosis more complex like having additional types of handicapping conditions) are labeled "Trainable" or "Educable" and are usually assigned to a regular public school system for some form of special education treatment to be delivered in a non-residential day school setting. Some fraction of these children undoubtedly were institutionalized because they had, in addition to a very low IQ score, some compounding disability conditions (e.g., severe lack of control of physical movements) so that they were not mislabeled or misassigned. However, people charged with overseeing implementation of the court's order* report that this cannot explain all of the 37 percent; i.e., some of these children were inappropriately assigned to an institutional setting.

Other evidence comes from studies done by psychologists concerned with the problem of the cultural bias in the standard IQ test and the degree to which this leads to the mislabeling of non-handicapped minority group children. For example Hobbs reports on a study in which the rate at which persons were being mislabeled as retarded were reduced almost 50 percent when an adaptive behavior test, in addition to the IQ test, was required. Almost all of the children who changed over from handicapped to non-handicapped status were Blacks or Chicano.

There is also some striking indirect evidence in connection with the category "Emotionally Disturbed." Many authorities in the field feel that there is widespread abuse with regard to this category. Children with no emotional disturbance problem but who have serious

*Telephone interview with Dr. Makuch.
**Hobbs, Op. Cit., p. 29-30

disciplinary problems are likely to end up labeled as emotionally disturbed. Perhaps the most widely cited evidence on this phenomenon is the difference in incidence of this handicapping condition by sex and age. Chart 1 shows data obtained from the National Center for Health Statistics' periodic survey of health status. Note the significantly higher rate for boys in the early years of elementary school which tends to disappear at the latter high school grade. Some of the narrowing could be due to selection processes that take place with age as more and more of the emotionally disturbed either recover or become institutionalized so that by the senior year of high school only the non-emotionally disturbed are left in school. Although this could probably explain some of the observed narrowing between age cohorts, it is not likely to account for all of it. In part it reflects mislabeled "bad boys" being unlabeled as they learn with experience to become "good boys."

The indirect evidence suggests that mislabeling and misassignment could be a significantly widespread phenomenon. Is there anything more direct we can say on the magnitude of benefits? By exactly how much special education outlays will fall is difficult to say, but it appears that the savings could be substantial. For example, even if we assume that only 50,000 children will shift from residential institutions to programs in regular school systems, an expenditure saving of $150 million per year would result. This assumes that the differential in educational outlays between a typical residency situation and a typical special education program in a day school setting is three thousand dollars per student, per year. Other crude cost saving calculations will be made and incorporated in a summary analysis below.*

Empirical evidence on the earnings capacity effects of mislabeling and misassignment is scanty, but what exists is very interesting. There is one study reported on by Conley** in which a group of low IQ students from regular classes (i.e., they were not labeled MR) was followed up along with a group of labeled children from both residency and special day programs. The study reported the following findings. Among those who had been officially labeled MR, labor force participation increased steadily with IQ level except that among

*A detailed study of the cost saving effect of moving to less restrictive settings would also have to include an analysis of the possible sources of increases in expenditures per regular pupil that might take place when large numbers of handicapped children are mainstreamed. This effect would reduce somewhat the net expenditure savings but would not eliminate it. Also, some attention should be paid to the issue of possible non-pecuniary costs imposed on non-handicapped students due to mainstreaming handicapped children. Interviews with lawyers and others specializing in the area of handicapped children suggest that this is not an important issue. In practice the mainstreaming of handicapped children has not been observed to interfere with the education obtained by non-handicapped children.

**Conly, Op. Cit. p. 193

CHART 1

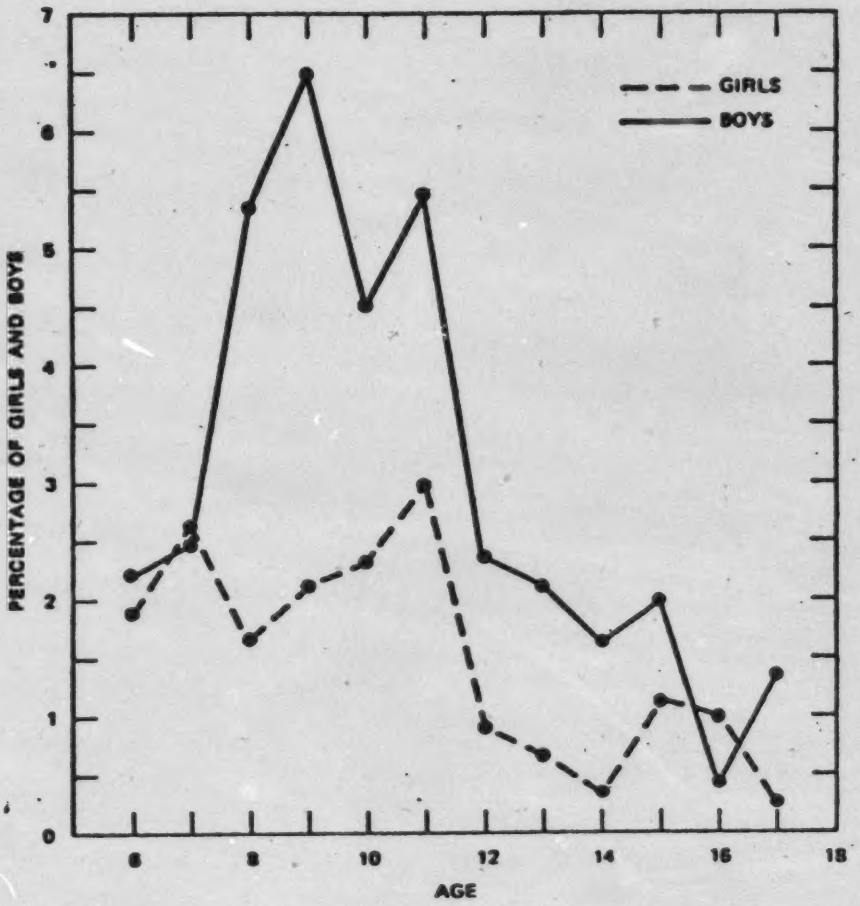

FIG. 4: COMPARISON BETWEEN GIRLS AND BOYS IDENTIFIED BY THE SCHOOL AS EMOTIONALLY DISTURBED, BY AGE

Source of Data: National Center for Health Statistics, Series 11. #139.

Chart is taken from Craig and McEachron, The Development and Analysis of Base Line Data for the Estimation of Incidence in the Handicapped School Age Population, Stanford Research Institute, California, 1975, Study prepared for the Assistant Secretary of Education, Office of Education HEW.

those with the highest IQ levels, participation fell below that of the members of the preceding IQ category. However, among those low IQ students who had not been labeled (and who had IQs about the same level as the highest IQ group among the labeled group) labor force participation was the highest of all.*

Another source of evidence on the effects of mislabeling and misassignment are the numerous studies of subsequent differences between institutionalized and non-institutionalized handicapped people. Both Hobbs and Conley cite follow-up studies that find that, ceteris paribus, institutionalization produces a variety of negative impacts -- low self esteem, excessive dependence, etc.

It is difficult to generalize from indirect evidence that was obtained in widely differing surveys etc. Much more time would be required in order to do a detailed critique of all existing studies and to even begin quantifying pecuniary benefits. Hobbs, who is a well-known authority in the field and who just completed a comprehensive survey of all aspects of this area, concluded very strongly that even what might be called "proper" labeling and categorizing can permanently stigmatize children and can lead to a reduction in their capacity to enjoy life and earn a living.

Handicapped Children in Need of More Resources. As noted above many States have already passed laws requiring that all handicapped children must be served and available data on trends show that over time more special education resources have been provided to the handicapped.

However, according to estimates of the overall incidence of handicapping conditions various gaps in coverage still exist. Table 7 shows the latest estimates of this gap both in the aggregate and by type of condition. We will use these numbers to make estimates of the gross cost increment from extending special educational resources to all uncovered children. The possible cost reducing effects via mainstreaming and less mislabeling, are brought together in the final section. The figures in Table 7 have a number of characteristics that should be understood before using them to estimate the gross increase in expenditures.

In each of the handicapping categories the figures for the total number of children (served plus unserved) are based on information obtained from a variety of sources including information from national agencies and organizations, plus state and local directors of special education. For most of the categories the overall incidence estimates

*It could be argued that much of the mislabeling effect is explained by the fact that mislabeled children usually are from very deprived family backgrounds and that it is this factor rather than mislabeling per se that produces the observed relation. No available study had tried to hold this factor constant and many investigators have found a strong correlation between parental apathy and mislabeling.

TABLE 7

ESTIMATED NUMBER OF HANDICAPPED CHILDREN SERVED AND UNSERVED BY TYPE OF HANDICAP 1974-75

Type of Handicap	Served	Unserved	Total	% Served
Total Age 0-19	3,947,000	3,939,000	7,886,000	50%
Total 6-19	3,687,000	3,012,000	6,699,000	55
Total 0-5	260,000	927,000	1,187,000	22
Speech Impaired	1,850,000	443,000	2,293,000	81
Mentally Retarded	1,250,000	257,000 (655,000)*	1,507,000 (890,000)*	83 (26)*
Learning Disabilities	235,000	1,731,000	1,966,000	12
Emotionally Disturbed	230,000	1,080,000	1,310,000	18
Crippled & Impaired	235,000	93,000	328,000	72
Deaf	35,000	14,000	49,000	71
Hard of Hearing	60,000	268,000	328,000	18
Visually Handicapped	39,000	27,000	66,000	59
Multi-Handicapped	13,000	27,000	40,000	33

Source: Same as for Table 6, 74-75 figures. The additional incidence factors are: LD=3.0%, Multi-H: .06%
Note: The same caveats in the note to Table 6 apply here

*Assumes a learing disabled incidence rate of 1.0% rather than 3%. See discussion in text.

from these sources has remained uncomfortably constant since around 1960; i.e., for visually handicapped, hard of hearing, speech-impared, emotionally disturbed and mentally retarded, the incidence percentages used in FY 75 are the same as those used in 1960.* This could lead to significant error especially for those categories (e.g., emotionally disturbed) that may have been influenced by developments in psychiatry and preschool intervention programs during the 60's.**

The category "learning disabilities" is a relatively new formal label for handicapped children. It is very controversial among students in the field. Many investigators assert that there is no objective way of ascertaining that a child has a "learning disability" other than to point to the results of the supposed handicap -- low grades in school relative to expectations, given the child's performance on IQ and other standardized tests. One skeptical researcher concludes that "children who fail in school but do not fit into other special education categories also may be labeled learning disabled.***

Another characteristic to note is that, for the most part, the numbers in the served category include children who are being served by private schools**** and the numbers for the unserved in most of the categories (emotionally disturbed however may be an important exception) represent children who are enrolled fulltime in regular public school classes. For the emotionally disturbed, however, they could represent large numbers of children in residential institutions who are not receiving any educational services at all. (Members of our first group above.)

In sum, it is likely that most of the estimated unserved children shown in Table 7 are moderately to borderline handicapped children, now enrolled in public schools, and spending their full time in regular classes. They are receiving no attention in a resource room, nor are they spending part or all of their day in special classes or buildings. Thus, the cost factors with which to multiply the unserved numbers in Table 7 should be ones that represent special education for a moderate to mildly handicapped child.

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*See the notes to Table 6.

**Ongoing research at the Stanford Research Institute is attempting to explore the usefulness of the National Center for Health Statistics survey for estimating the incidence of certain handicapping conditions (see the citation to Chart 1 above). However, there are still many unresolved problems with using this survey to guide educational policy (as opposed to medical care policy).

***Hobbs, Op. Cit. p. 80-81

****Most states now provide some form of partial reimbursement to parents who place their children in special private schools (or at least the state will keep records of all the hearings that were held in connection with parents' desires to go outside the public system). These generate records which each state searches when it is submitting its annual estimates of children being served.

The only available cost factors based on a systematic and identifiable sample of schools were those done by Rossmiller, Hale and Frohreich in their well known 1969 study for the National Education Finance Project.* They present excess cost estimates by type of handicapping category for a sample of "outstanding" school systems, i.e., ones which were selected on the basis of a panel of experts saying that they had exemplary special education programs. Unfortunately, they did not present any analysis of their cost factors by severity of handicap within a type category. However, they did present a detailed narrative discussion of the programs in each of the systems they served and there was variation in types of programs offered within a handicapping category. At any rate their published data allow for selecting excess cost factors along a range from high to low.

Table 8 contains various estimates of excess cost multipliers to apply to the numbers of unserved handicapped children in Table 7. Although these cost estimates are based on one of the better known studies in this field, they still suffer from a number of conceptual ambiguities that make them difficult for us to utilize.

For example, the authors make clear that they obtained all of the components of their per pupil cost factors on the basis of full-time equivalent average daily memberships. Thus, the school districts surveyed were asked to allocate a handicapped students' time to both regular classes and special classes if, in fact, he did not spend all his time in special classes. However, in their summary tables, the authors only report the figures that would be applicable for a "full-time" special education student. They do not report what fraction of his time a typical special education student (in the districts surveyed) actually spent in a special education setting. To use their reported excess cost factors as they are we would have to assume that our typical unserved handicapped child will require a program delivered entirely in a separate special education setting (either in a separate classroom in a regular school building or a separate building). We did assume this for our "high side" cost factors. For our "low-side" cost factors we assumed that the typical unserved student would spend 1/2 of his time in special educational settings and 1/2 in a regular setting. We computed a simple average of the per student cost of a full-time special education student and that of a regular student that were reported by Rossmiller et al.**

There are a few other serious problems with utilizing the factors reported in the Rossmiller study. The rather high figure they report for physically handicapped probably

*Rossmiller, Hale and Frohreich Educational Programs for Exceptional Children: Resource Configurations and Costs, National Education Finance Project Special Study #2 Department of Educational Administration University of Wisconsin, 1970. Tables showing the per pupil cost indices.

** This assumes, inter alia, that there are no diseconomies of scale involved as we move from a full-time special education mode to a part-time one.

TABLE 8

SPECIAL EDUCATION EXCESS COST FACTORS

BY HANDICAPPING CATEGORY

Type of Handicap	Cost Index*		Amount of Excess Cost per pupil. ($)**	
	High cost	Low cost	High cost	Low cost
Speech Impaired	1.2	1.1	$200	$100
Mentally Retarded	2.0	1.5	$1,000	$500
Learning Disabilities	2.1	1.5	$1,100	$500
Emotionally Disturbed	2.8	1.9	$1,800	$900
Crippled and Other Impaired	3.6	2.8	$2,600	$1,300
Deaf	3.5	2.2	$2,500	$1,200
Hard of Hearing	2.0	1.5	$1,000	$500
Visually handicapped	3.0	2.0	$2,000	$1,000
Deaf/Blind or other Multi Handicapped	2.7	1.8	$1,700	$800

*This is the ratio of the total cost (special education expenditure plus any regular education resources) used to educate a handicapped child to the total cost of educating a non-handicapped child.

**Derived by multiplying the quantity (cost index -1) by $1,000. $1,000 was used as an estimate of the countrywide average expenditure per pupil in regular instruction. The National Conference of State Legislatures reported that in 1975 this figure was $1,163. See their study of State Special Education Finance, p. 8.

Source: The cost index ratios are from Rossmiller, Hale and Frorich, Educational Programs for Exceptional Children: Resource Configuration and Costs. National Education Finance Project, (University of Wisconsin, 1970). The high side ratios are the median values of the ratio as across all the districts in their sample. This is considered "high" because of the probable less severe nature of the currently not served group. The low side estimates are explained in the text.

contains a structural building component that we have already accounted for in estimating the cost of the building accessibility subpart. Another problem is the relatively low cost factor for the multiple handicapped group. This probably reflects the particular mix of severity levels among the handicapped that existed in the surveyed school districts at the time of the study. In short, the reader must keep all these shortcomings in mind in assessing the validity of our cost estimates.

Table 9 contains estimates of the gross increase in expenditures required to reach all children currently classified as unserved. They range from high to low because of variation in the cost factors used, because of varying assumptions about the exact number of unserved children with learning disabilities, and because of the age range assumed to be covered.

At one extreme the gross cost increase may only be $1.3 billion dollars per year (or 48 percent of what we estimated was actually spent on special education resources for covered children in 1974-75).* This estimate assumes that the low side cost factors are relevant, that only school age children are covered and that a 1 percent incidence figure for Learning Disabled is used rather than the current official 3 percent figure. At the high extreme the gross cost increment is $4.8 billion dollars per year (or 155 percent of estimated current expenditures). This estimate assumes that the high side cost factors are relevant, that the target age range is 0-19 and that the official 3 percent incidence for Learning Disabled prevails.**

We have ignored the effect of shifts of already served children between partially reimbursed programs (under which a handicapped child attends a private school or institution) and ones that will be fully funded by public funds. At this time almost all states have some form of partial reimbursement scheme under which parents can obtain at least part of the cost of placing their child in a non-public special education school or institution. In some states the parent is free to choose between "free" public and partially reimbursed private (e.g., Maryland up until very recently), while in others the partial

*Whether or not the specialized resources being supplied to already covered children are adequate is also an issue. We have not addressed this because data on actual expenditures in 74-75 are not yet available. If we assume the figures we estimate are in fact adequate (which does not appear unreasonable; since we used our "high-side" cost factors to generate them) then we are underestimating gross cost increments if actual 74-75 expenditures are below them and overestimating if the reverse is true.

**The high side age range assumption is not consistent with the regulation as written. The regulation states that until 1978 the required age range coverage for handicapped children is the same as each state requires for its non-handicapped children. By 1978 the required range expands to 3-18 and by 1980 to 3-21. However this extension is only mandatory if the state does not have a specific law prohibiting extension beyond 6-18. Also the definition of the category Learning Disabled in the regulation is very narrow and it will probably preclude use of an incidence factor as large as 3%.

TABLE 9

ESTIMATES OF THE GROSS INCREASE IN EXPENDITURES FROM EXTENDING SPECIAL EDUCATION TO ALL UNSERVED CHILDREN
(In Billions of Dollars per Year and as Percent of Existing Special Education Expenditures)

Age Range	Estimated cost for children already being served in 74-75*	High-side cost factors		Low-side cost factors	
		Learning Disability IR=3%	Learning Disability IR=1%	Learning Disability IR=3%	Learning Disability IR=1%
0-19	$3.1	$4.8/155%	$3.7/119%	$2.3/74%	$1.8/58%
6-19	$2.9	$3.7/127%	$2.8/97%	$1.8/62%	$1.3/48%
0-5	.2	$1.1/550%	$0.9/450%	$0.5/250%	$0.4/200%

SOURCE: Table 7 and 8 and see discussion in the text.

*These are not based on what schools actually spent on special education in FY 75. They were constructed by multiplying the number currently served in each category (Table 7) by the corresponding high side cost factor in Table 8.

reimbursement option is only allowed when there are no public facilities available (e.g., Virginia at the present time). In phone interviews with special education specialists in both Virginia and Maryland the latest data on the fraction of all special education that came under partial reimbursement was obtained. The fraction (for the non-residential sector) were very small -- 1.8 percent for Virginia and about 3 percent for Maryland.* (The reimbursement program in Maryland is slightly more generous than in Virginia.) Thus the net impact of this omission on our gross cost estimates will not be significant.

Before we turn to a consolidation of our cost analysis for the three groups we will briefly comment on the benefits that can be expected from the additional coverage. Up to this point we have considered the evidence on the earnings capacity effects of reducing mislabeling and misassignment. The same authors who stress the importance of this factor (e.g., Hobbs) also emphasize the importance of not going too far in the direction of avoiding all labeling. They stress that there are types of children and handicapping conditions that can benefit greatly from the thoughtful application of high quality special education programs.

Unfortunately for the two most important (in terms of numbers) categories of unserved children -- emotionally disturbed and learning disabled -- no hard evidence on earnings capacity effects could be located in a short time frame. Only for the mentally retarded are there readily available findings.

Conley** reports that shortly after termination from State vocational rehabilitation programs young, mentally retarded adults who have been recorded as "rehabilitated" (which means they have successfully completed the training course and have been placed in a job) were earning hourly rates of pay about equal to that observed among general samples of mentally retarded individuals of the same age and severity category. Further, Conley believes that "A-priori we would expect that the average lifetime productivity of retarded rehabilitants would be less than our estimate for retarded workers generally since the very fact of referall for vocational rehabilitation is a manifestation of some vocational difficulties." On this basis Conley*** concluded that vocational rehabilitation

*Ms. Lucile Anderson, Virginia State Department of Education and Mr. James Keim, Maryland State Department of Education

**Conley, Op. Cit., pp. 284-289

***It is important to note that the validity of the direction of the selectivity bias that Conley assumes is crucial to the credibility of his estimates. To a non-specialist in this area its validity is not intuitively obvious. Indeed a recent survey of all published benefit/cost studies of vocational rehabilitation concludes that it is not possible to conclude anything (either positive or negative) about the earnings effect of vocational rehabilitation training. (John Noble, "Economic Analysis of Rehabilitation Benefits: Can the 'State of the Art' Conclude Anything About Priorities," Paper Presented at the Annual Meeting of the American Association for the Advancement of Science, New York, Jan 26-31, 1975.) Overall time constraints precluded any additional work on this issue.

training had had an effect on the earnings capacity of the mentally retarded. Calling on his previous work relating to all rehabilitants (both mentally retarded and other disabling conditions) Conley comes to a "reasoned guess" that about 50 percent of the observed post program earnings of retarded rehabilitants can be attributed to the vocational rehabilitation training. On these assumptions Conley is able to show that the dollars spent on vocational rehabilitation training for mentally retarded young men are all recouped in the form of increased future earnings.

What is the significance of this finding? For the category Mentally Retarded (MR) alone it would appear highly relevant. The higher quality MR programs described by Rossmiller et. al., all consisted of very up-to-date vocational education training type situations. However, for the other two major sources of cost increase -- emotionally disturbed and learning disabled -- there is less certainty. The children involved in these categories may have a totally different set of ability/motivation problems than MR children do so that the apparent success of special education with the one group does not imply success with the other. However, the data we present in appendix A on the interaction between the earnings effect of disability and the level of education attained, suggests that rehabilitation type resources might have large effects on earnings capacity.

Summary and Alternative Phase-In Strategies

Our analysis has identified two sources of cost increase and one of cost decrease that will be associated with attaining the goal of free, adequate and appropriate education (in the least restrictive setting possible) for all handicapped children.

One source of cost increase involves extending the delivery of some form of education/training services to all severely and profoundly handicapped youngsters (primarily the mentally retarded and the emotionally disturbed), the so called "0-based reject policy." This cost will depend on how many are currently not being served and the educational cost per child of delivering the services in an institutional setting. Above we noted that expert opinion puts this per pupil cost at about $5,000 per year. The number of these children could range anywhere from 50,000 to 500,000 given the vagueness of existing data sources. We separated out this source of cost increase from the main body of our cost analysis because of the obvious compelling nature of the situation these children are in. Also, we showed that in addition to purely humanitarian benefits it was possible that pecuniary benefits (in the form of reduced maintenance costs) might be forthcoming if the training resulted in increased ability to cope with the simple tasks of everyday existence.

The other source of cost increase -- extension of free services to all the moderate and mildly handicapped not now being served -- was analyzed in terms of a few parameters and the results summarized in Table 9. The categories in the Table suggest a number of possible areas of policy options -- e.g., the costs of increasing the age range to cover younger and younger children should be balanced by increased benefits; considerable thought and study should be given to the estimation of prevalence rates for the Learning Disabled category; etc.

We stressed the "gross" aspect of these cost increments because the regulation is expected to have offsetting cost decreasing effects via the reduction of mislabeling and misassignment and the integration of physically handicapped children allowed by the greater building accessibility provided by subpart C. Precisely how large these offset factors will be cannot be determined without an elaborate study. Some crude calculations might be suggestive of possibilities. We noted above that a shift of 50,000 youngsters from residential to non-residential special educational setting could save around $150 million a year. If we also assume that 20 percent of all the mentally retarded, learning disabled and emotionally disturbed shift from special education day school programs to full-time regular settings then this could reduce costs by $235 million more. (This assumes the "low-side" cost factors in Table 8 are relevant.) The combined effect is to reduce the low-side gross increments in Table 6 by $385 million. If we assume that 50 percent of the MRs, LDs and EDs are shifted into full time regular settings then the low-side offset factor rises to $740 million. We also estimate an annual savings of $65 million from integrating physically handicapped children.*

In concluding this section of the analysis it is important to briefly note the implications of the dynamic dimension of the situation -- just how rapidly should the SEAs and LEAs be pushed toward the objective. PL 94-142 contains a definite time table, while the proposed regulation does not. In any event it should be recognized that increased rapidity of attainment is definitely not a free-good -- it will raise the overall cost associated with attaining the objective. The major source of bottlenecks would appear to be specially trained manpower. These bottlenecks can influence costs and benefits in two ways. First, the low quality of hurriedly put together programs (along with the bad feeling generated between federal and local officials) can hurt morale and possibly keep program quality below the optimum level long past the time at which a slower approach would have had the objective in place and at a much higher quality level. Second, it will simply cost more in terms of scarce resources used up to get to the objective faster -- e.g., teachers will have to work overtime to train special education teachers; people with related skills in other areas will have to be induced to enter special education as a career, etc.

On the other side it is also clear that increased total amounts of benefits are likely to flow from attaining the goal at an earlier date. What is important here is that the implementers of the policy be keenly aware of these trade-offs and remain as flexible as possible with regard to enforcing target dates while at the same time not letting school districts use this flexible stance to avoid compliance indefinitely.

*We estimated that there are about 250,000 physically handicapped youngsters receiving special education resources (Table 6). We also estimated that the excess cost incurred per student served is $2,600 (Table 8). If we assume that 50,000 of these children will be shifted to regular buildings for their regular education and that this reduces the annual cost of educating them by $1,300, then the annual savings would by $65 million.

V. HIGHER EDUCATION (Subpart E)

The major expense imposed on institutions of higher education by this regulation will be the cost of complying with the requirements of Subpart C on building accessibility. It is not expected that Subpart E,* which requires nondiscrimination in recruitment admissions and provision of courses and non-curricular services, will impose any significant additional costs.

The estimates of handicapped children in table 7 suggest that in any year no more than 200,000 college aged handicapped people are enrolled in degree granting institutions of higher education, and this amounts to less than 2% of their total enrollment.** After consultation with groups within the Department, it was concluded that none of the requirements of Subpart E will impost any substantial amount of costs on the recipients. And even if costs were to rise to a perceptible level, they would be balanced by benefits from the increased earnings capacity of those additional handicapped individuals who earn college degrees.

Non-Accessibility Provisions

Section 84.44(b) is concerned with course examination procedures for students with impaired sensory, manual, or speaking skills. It requires recipients to provide methods of assessing the academic achievement of such students which insure that the student's grades reflect his achievement, not his handicap. Thus, blind students must be allowed such alternatives to regular examination procedures as take-home examinations, the use of a reader, or, in the case of an essay examination, the opportunity to transcribe the questions into braille.

Paragraph (c) of section 84.44 provides that a recipient must ensure that no qualified handicapped student with impaired communicative skills be denied effective participation in its program because of lack of necessary auxiliary educational aids. (Individually prescribed or general purpose aids such as eyeglasses or wheel chairs are not, of course, included). In many cases, this provision will not impose any additional financial burden

*Subpart E generally follows the Department's Title IX regulation.

**Of the 6.6 million handicapped children (6-19) in table 7 we assume about 2.0 million will have both the potential for college attendance and require some accommodation. This assumes that all the mentally retarded will not be qualified and also that all those qualified among the speech impaired will not require any accommodation. Of the remainder, we assume that all persons in the physical disability categories will be qualified and that about 1.3 million of the learning disabled and emotionally disturbed will qualify. We then assume that 1/3 of the qualified will choose to go on to college. This means that an age cohort 6-19 will yield about 200,000 attendees aged 18-24 during any given year.

because the aids are provided by vocational rehabilitation agencies. Where such is not the case, however, the responsibility for providing auxiliary aids or their equivalent is borne by the recipient. For example, if a deaf student is unable to obtain the services of a classroom interpreter from the vocational rehabilitation agency, the recipient is responsible for providing an interpreter, a written version of class materials, or the opportunity to pursue independent study. Aids and services can often be provided at minimum expense by making them available in the recipient's library or other resource center. Comments from within the Department contained no estimate of the cost of this requirement. However, it is not believed it will be substantial as long as enforcement is done in a manner which allows flexibility in means of compliance.

Section 84.45 prohibits discrimination in the provision of student housing. Additional costs incurred in making a portion of the university's own housing accessible are included in the estimated costs of accessibility in section III of this statement. No additional costs, except insignificant administrative expenses, are anticipated from the requirement that recipients ensure that non-campus housing is, as a whole, offered in a nondiscriminatory manner.

The provision of health services without discrimination on the basis of handicap, required by section 84.46 (a), may, in some instances, impose minor additional costs. While this section does not require treatment for special handicapping conditions, some types of handicapping conditions do result in a greater than average need for routine health care. However, because the proportion of such students in any student body is quite low, any cost increase should be easily absorbed by the recipients; that is, the average per unit cost of providing health services to all students should not rise perceptibly.

Paragraph (a) of section 84.48 prohibits discrimination on the basis of handicap in the provision of physical education courses and athletics. A recipient who has an athletics program must operate the program so that handicapped students are afforded an opportunity to participate in comparable activities. Only minimal accommodation should be necessary for compliance. Because of the great variance in both types of handicapping conditions and in types of athletic activities, there is probably no handicapped person who cannot participate in at least one existing type of activity. At most, minor modifications of equipment would be necessary.

Thus, as stated in the introductory paragraph, increases in expenditures to institutions of higher education necessitated by this subpart are not expected to be significant. Those connected with modification of a sufficient number of existing buildings to comply with the requirement of program accessibility may be significant and these costs are covered in section III of this statement.

Benefits

In appendix A, evidence is presented on the very strong interaction between the level of formal education attained and the size of the effect of even severe disability on earnings capacity (see table A-8). Although these data refer to a group, disabled veterans, who obtained their disability after becoming young adults, the implications for the effect of education should also apply to physically disabled persons who are either born with the condition or have an accident very early in life. Again, one can only conjecture about the possible magnitude of the benefits from this source.

1970 Census data show that only 3.3% of persons aged 18-44 who reported that they were severely disabled* had attained a college degree or more. Other tables from this same source show very low reported labor force participation and annual earnings for this same subgroup of severely disabled persons. If we assume that the percentage of this group who finish college will increase to 6.0% and that college graduation increases the annual earnings of a severely disabled worker to that of the average partially disabled worker, then the annual flow of benefits from this source would eventually rise to about $100 million.** Enhanced educational opportunities can also be expected to increase the annual earnings of moderately and mildly handicapped persons, although the earnings increase will not be as great as with severely disabled persons, many more persons will be affected.

*The severely disabled reported in the 1970 Census were those individuals who said that their disability keeps them from holding any job at all. (See appendix A.)

**It will take a number of years for the educational attainment of the entire stock of severely disabled persons 18-44 to rise to that of 6.0% having college degrees. The total number involved is about 22,000 individuals who will be earning about $4,500 per year more on account of having gotten a college degree. After 10 years about half of the $100 million figure will have been reached.

VI. HEALTH AND SOCIAL SERVICES (Subpart F)

Subpart F prohibits discrimination on the basis of handicap in the provision of health and welfare services. Comments solicited from within the Department suggested that Subpart F will not have a substantial effect on the cost of providing health and social services. This is because these service systems are already structured to permit the participation of handicapped clients.*

Although the requirements of this subpart may, in a few cases, necessitate initial additional expenditures for staffing or equipment, such cases are of minor proportions. They should not require any substantial operational changes in existing health and social service systems. Moreover, to safeguard against imposing overly burdensome requirements especially with respect to small providers of health and social services, this subpart allows such factors as the size of the recipient's program to be considered in determining the appropriate corrective action to be taken by recipients. The flexibility thereby built into this subpart should further minimize its cost impact.

The provision relating to the education of persons institutionalized because of handicap may also necessitate initial additional expenditures. These expenditures are, however, included in the estimates contained in Section IV of this statement.

The subpart also requires recipients to compensate a handicapped patient who performs work which is either non-therapeutic or for which the institution would otherwise have had to hire an employee. Since this provision does not force recipients to use the labor of the handicapped, any outlays that are incurred can be assumed to be covered by economic benefits obtained by recipients.

The alternative to this provision is to permit the recipient to utilize patient labor without compensation. Although this alternative would lower the costs of compliance it has been held to be unconstitutional (see Souder v. Brenner, 367 F. Supp. 808 (D.D.C. 1973) and, as such, cannot be considered an actual alternative to the compensation provision as drafted.

*Note again that the costs associated with making buildings accessible have already been covered in Section III.

VII. SUMMARY AND CONCLUSIONS

We have analyzed in some detail the costs and benefits of the three major subparts of the regulation that cover employment practices, building accessibility and the provision of elementary and secondary education. We found that in all cases there was evidence for pecuniary benefits that provide substantial offsets to the pecuniary cost involved. Indeed, even if non-pecuniary benefits are not added, the balance of benefits and costs appears in favor of implementation of the regulation.

The nature and quality of the evidence on benefits varies considerably. In some cases, it is more straightforward and convincing than in others, as in the case of cost reductions due to shifts to less restrictive settings. In others the empirical evidence is very sparse, but what there is, is highly suggestive, as in the case of benefits from eliminating discrimination in employment, and the benefits from reduced mislabeling and the improved quantity and quality of special education.

By far the most substantial source of cost increase comes from the extension of special education to all handicapped children not now served. We estimated that the annual gross cost increment could fall anywhere in the range $4.8 to $1.3 billion, depending on assumptions about cost factors, incidence of the condition "Learning Disabled", and the age range of the children covered.* The two other sources of possible significant cost increase are building accessibility and complying with the reasonable accommodation of subpart B. On the basis of our analysis it is doubtful that the additional annual cost from these two sources would ever exceed $100 million.**

If we take a simple average of our high and low side estimates for special education (i.e., $3.1 billion) then we estimate that these three sources together would create about $3.2 billion in annual costs. What magnitude of annual pecuniary benefits do we estimate? In our analysis of subpart D we estimated that as much as $800 million per year in special education expenditures might be saved because of shifts to less restrictive settings and reduced mislabeling of non-handicapped children. In the section on higher education, we estimated that the aggregate annual earnings capacity of the handicapped workers would be

*This range is slightly upward biased because of our treatment of very severely handicapped children in institutions. Since we analyzed this group separately (see discussion on page 40) we should net them out of our calculation of the annual gross cost increment. We have already assumed that these costs will be balanced by the special benefits involved. However, since the exact number of these children is not known we have not attempted this refinement.

**The total cost of making existing buildings accessible was estimated at about $350 million. This is approximately equivalent to a perpetual annual cost of about $50 million. We estimated (appendix A) that perhaps a million disabled workers would be covered by subpart B. Even if we assume that the reasonable accommodation provision would result in an expenditure of $100 per year on one-half of them (which is probably an overestimate of numbers that would require special resources) that would only come to another $50 million.

increased by $100 million on account of the increase in college degrees among them. In our analysis of Subpart B we estimated that the elimination of employment discrimination might add as much as $1 billion to annual benefits. Thus a conservative figure would be $500 million. At this point benefits total to $1.4 billion, still $1.8 billion short of annual costs. We have not yet put a dollar amount on the increase in earnings capacity from the reduced mislabeling and the increased coverage of special education. It is likely that at any point in time at least 3 million individuals in the adult labor force were once handicapped children. Assume that on account of the achievement of full coverage and better labeling, about 1.5 million of them have their earnings capacity affected. If we further assume that on the average they all earn $1000 more per year, we then have another $1.5 billion in annual benefits, leaving a pecuniary cost deficit of only $.3 billion per year to be balanced against psychic benefits. This is the reason for our above conclusion on the near favorable balance even without adding in psychic benefits. Table 10 summarizes the above calculations.

TABLE 10

SUMMARY OF ESTIMATED ANNUAL PECUNIARY COSTS AND BENEFITS FOR ALL SUB-PARTS[d]
(Billions of dollars)

Sub-parts	(1) Costs[a]	(2) Benefits	(3) (1) − (2)
Employment practices	.05	.5	-.45
Program accessibility	.05	[b]	+.05
Elementary and secondary	2.3[c]	1.5	+.8
Higher Education	N.E.	.1	-.1
Health and Social Services	N.E.	N.E.	N.E.
Total	2.4	2.1	+.3

[a] For the parts other than program accessibility only non-accessibility costs are included.

[b] Benefits from program accessibility are included in the amounts for the other sub-parts.

[c] This is the average net increase (4.8 - .8)+(1.3 - .8)/2, where .8 is the reduction in cost due to shifts to less restrictive settings.

[d] This is before allowance for the effect of existing laws. See below.

N.E. = Not estimated, assumed to be negligible.

In using our analysis of overall benefits and costs the reader should keep in mind a number of factors that, although possibly significant to decisions about the impact of the regulation, are not highlighted by our analysis.

First, our estimates of costs and benefits measure only the "net" increment either in output gain (benefits) or resources used up (costs). They do not cover what economists call transfer and distribution effects. One important transfer effect in this case would be the (possible) reduction in income maintenance payments brought on by the increased earnings capacity of the handicapped. This effect is not added to benefits because the amount of saving to taxpayers is exactly balanced by the reduction in benefits of those who had been receiving the income maintenance payments. However from the taxpayers point of view it can be a significant consideration. Similarly an important distribution effect of the proposed regulation is reflected in the fact that the great bulk of the costs fall on state and local governments while the great bulk of the benefits accrue to private citizens -- handicapped persons.

Second, as already noted, this regulation duplicates and supplements to a substantial extent existing law. It would not be unreasonable to argue that, say, 50% of the elementary and secondary education effects and perhaps 25% of the remainder are properly attributable to existing laws. While it would be unrealistic to attempt to "fine tune" the estimates in Table 10, the final judgment on the effects of the regulation would have to be that both costs and benefits may be substantially below two billion dollars annually.

Third, there is one omission from the analysis that is perhaps worthy of note. No attempt has been made to estimate separately administrative and related costs of complying with its procedures (e.g., public notice, creation of new tests, preparing compliance plans, and the like). While such costs are certainly far smaller than the costs of providing services, they may well be in the range of tens of millions annually. It can be expected that public comments on the Notice of Proposed Rule-making will provide a basis for any changes necessary to assure that such costs are held to the minimum necessary to effectuate the substantive requirements of the law.

Finally, although we conclude that the regulation should be implemented, we do urge that consideration be given to some of the details of coverage, wording, and the dynamics of implementation. In particular we have highlighted the following areas: wording and content of the "reasonable accommodation" provision; precise coverage of the handicapping category "Learning Disabled;" decision on which agency of the State government should bear the non-educational costs of institutionalized handicapped children; the type and degree of flexibility in enforcing compliance and alternative timing and phase in strategies.

APPENDIX A

DISABILITY, DISCRIMINATION AND EARNINGS: A SURVEY/ANALYSIS

Tables 1-A through 4-A show data from the 1970 Census of Population on the numbers and characteristics of the disabled. The 1970 census asked the following question on disability: "Did you have a health or physical condition which limits the kind or amount of work you do?"

Many disabled individuals do not consider themselves limited in the amount or type of work they can do, so that the numbers in table 1 understate the number of disabled individuals that will be potentially eligible for protection under the proposed regulation. Data from the National Center for Health Statistics suggest that the number of adults with a disability is well over twice the number that responded to the 1970 Census question.*

However the disabled individuals reported in the 1970 Census may be more relevant for analyzing the impact of the proposed regulation. This is because the disabled workers who will be most helped by the regulation--those who are now suffering from employment discrimination--may make up a larger fraction of the individuals covered by the Census than they do of the total population of handicapped individuals.**

How many disabled individuals will have their earnings levels increased on account of the regulation? One can use the numbers in table 1-A and some additional assumptions to get a rough idea. For example, one possible set of assumptions and the corresponding estimates would be the following.

*Wilder, Charles S., Prevalence of Selected Impairments, United States 1971, DHEW Publication No. (HRA) 75-1526, National Center for Health Statistics, May 1975.
**Either of two conditions could produce this result: (1) the probability of experiencing discrimination was (as of 1969) positively correlated with severity of disability and/or (2) the experience of job discrimination increases the probability that a disabled individual will answer "yes" to the Census question.

TABLE 1-A

INCIDENCE OF WORK DISABILITY BY SEVERITY OF DISABILITY, SEX AND AGE FOR PERSONS 18-64 YEARS OLD: UNITED STATES: 1970

	(1)	(2)	(3)	(4)	(5)	(6)
Age	Partially Work Disabled (000)	Totally Work Disabled (000)	Incidence: Percent of Population Work Disabled %	Percent of Population Reporting Totally Work Disabled %	Estimated*/ Percent Totally Work Disabled %	Percent of Population Who Reported They Never Worked
Total (Both Sexes)						
All ages	7,160	4,931	10.8%	4.4%	4.0%	.9%
18-24	1,004	329	5.7	1.4	2.5	.7
25-54	4,185	2,358	9.3	3.3		
55+	1,972	2,242	22.8	12.1	11.5	2.1
Male						
All ages	4,356	2,010	11.7%	3.7%	3.2%	.5%
18-24	689	157	7.5	1.4	1.9	.4
25-54	2,470	911	9.9	2.7		
55+	1,178	941	24.2	10.7	9.9	.7
Female						
All ages	2,803	2,921	9.9%	5.0%	4.7%	1.3%
18-24	315	172	4.1	1.4	3.1	.9
25-54	1,694	1,448	8.6	4.0		
55+	793	1,302	21.5	13.4	12.9	3.4

*/Only counts those who both reported themselves totally worked disabled and said they were not at work or seeking work.

Source: U.S. Bureau of the Census, Census of Population: 1975, Subject Reports, Final Report PC (2)-6C, Persons with Work Disability, U.S. Govt. Printing Office, Tables 1 and 4.

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TABLE 2-A

EMPLOYMENT STATUS AND EARNINGS IN 1969
BY DISABILITY STATUS, MALES 18-44:
UNITED STATES 1970

Employment status and earnings in 1969	Disability status: (1) Non-disabled	(2) Partially disabled	(3) (2)/(1)
Employment status:			
Total labor force (000)	28,689	1,811	-
Percent in total labor force	90.3	89.2	.987
Total employed (000)	26,886	1,735	-
Percent civilian labor force unemployed	3.7	5.7	1.540
Earnings in 1969:			
Mean earnings of those with earnings	$7,539	$6,065	.804
Percent with earnings	95.3	93.3	.979
Overall mean earnings	$7,185	$5,659	.788

Source: Same as table 1,
Census tables 4 and 9.

Assume that only the partially work disabled under 55 will have their earnings increased by the regulation. Also assume that only 1/2 of the partially disabled females under 55 would be affected in order to adjust for the sex differential in labor force participation. Finally, since State and Local Government and Medical and Health Services, which contain most of the grantees covered by the regulation, provide approximately 20 percent of total employment, assume that estimates can be made by multiplying combinations of the numbers in table 1 by .20 .*

These assumptions lead to an estimate of 833 thousand for the number of disabled workers that will have their earnings affected by the proposed regulation. If one includes all those under 55 (both partially and totally work disabled), the estimate will rise to 1.2 million; if we use a factor of .3 rather than .2 it also rises to 1.2 million, etc.

It is not clear if those who reported themselves as totally work disabled will be helped by the regulation. Almost all of these individuals reported no work experience during 1969

*Since the regulation also applies to subcontractors of covered grantees, a percentage greater than .20 is probably more appropriate. The fact that state and local governments also have a disproportionate number of "mental jobs" also indicates a factor larger than .20.

(compare columns 4 and 5 of table 1-A). On the other hand almost all of them reported that they had had work experience at some time previous to 1969 (compare columns 4 and 6 in table 1-A). Clearly some of these individuals will be in a position to be helped by the regulation as they recover somewhat from their conditions with time and rehabilitative services. However, it is not possible to conjecture, even roughly, how many this will be.

TABLE 3-A

OCCUPATIONAL STATUS BY DISABILITY STATUS
FOR EMPLOYED MALES 18-44
UNITED STATES 1970

	(1)	(2)	(3)
Percent distribution	Non-disabled	Partially disabled	(2)-(1)
Total	100%	100%	
Prof., tech. and kindred	17.0	13.4	-3.6
Mgrs. and admin. (except farm)	9.9	8.4	-1.5
Sales workers	6.6	6.7	-0.1
Clerical workers	7.9	9.4	+1.5
Craftsmen and kindred workers	21.3	18.9	-2.4
Operatives (except transp.)	14.4	15.6	+1.2
Transp. equip. oper.	6.3	6.7	+0.4
Laborers (except farm)	6.5	8.1	+1.6
Farm workers	3.2	3.9	+0.7
Service workers (except private H.H.)	6.8	8.5	+1.7
Private household workers	0.0	0.1	+0.1

Source: Same as table 1,
Census table 6.

By how much will the average disabled worker have his earnings capacity increased as a result of the proposed regulation? The data in table 2-A show that among those who report themselves as only partially work disabled, disability is not much of a barrier to employment per se. Labor force participation rates of non-disabled and partially disabled prime age males are very close. However, the quality of employment (both in terms of type and stability of the work) is another matter. Although the unemployment, occupational, (table 3-A) and earnings differentials between non-disabled and partially disabled are not enormous, they are still substantial and suggest that the proposed regulations might have a significant impact.

The data in table 4-A show that there is a moderate educational attainment differential between these two groups. This difference can account for about 3 percentage points of the

21.2 percentage point difference in overall mean earnings (last row and column of table 2-A).* Thus there is an 18 percent differential in earnings at the same educational level.** What part of this 18 percent is due to discrimination and therefore likely to be eliminated by the regulation? It is not possible to say precisely. But two other data sets, both relating to disabled veterans, give some further insight into the possible earnings effects of the regulation.

TABLE 4-A

YEARS OF SCHOOL COMPLETED BY DISABILITY STATUS, MALES 18-44: UNITED STATES 1970
(Percent distribution)

	Disability status		
School completed	Non-disabled	Partially work disabled	Totally work disabled
Less than high school grad	30.0%	39.0%	65.3%
High school grad	36.8	33.5	22.3
Some college or more	33.1	27.5	12.4
	100.	100.	100.

Source: Same as table 1, Census table 3.

Table 5-A presents some data from a special survey of disabled (and some non-abled) veterans. The purpose of the survey was to validate the earnings loss factors used by the Veterans Administration to determine the amount a disabled veteran receives as a disability allowance. Table 5-A shows both the actual earnings differential that existed in

*The three percent figure was estimated by using the method of "standardized averages." The earnings of all males, ages 25-34 by education cell were used to compute weighted averages of the two educational attainment distributions in table 4-A. These two averages differed by 3%. (See the 1970 Census of Population Subject Report, PC(2)-8B Earnings by Occupation and Education, table 1 for the earnings by education data used in this computation.)

**This is a very crude way of estimating the contribution of education differentials to earnings differentials by disability status. There is a large interaction effect between the earnings effects of disability and the level of education of the disabled person. (See below, table 8-A.) Thus although the average differential across all education cells is 18%, the differential among those with less than a high school education might be as much as 36% and that among college graduates close to 0%.

1967 between disabled and non-disabled veterans of the same age, education, and region of the country, as well as the rated percentage loss factor used by the VA at that time.

These loss factors represented the best judgment of medical people (around 1950) about how much earnings capacity was impaired by the particular type of disability. They reflect the mix of physical and mental requirements of the jobs available to veterans at that time. The fact that in 1967 actual earnings differentials were smaller than the rated loss factors (except for the mental disabilities) is probably related to the shifts in job content mix toward more mental and less physical tasks.*

Note the surprisingly small earnings losses for some of the very severe physical conditions. This suggests that many of the individuals who reported themselves as totally work disabled in the 1970 Census may be able to regain significant earnings capacity in later years.** Note also the striking difference in the relationship between rated and actual earnings loss percentages as between mental and physical disabilities. As noted above, this undoubtedly reflects differences in how much job restructuring can be used to accommodate these two types of disabling conditions. Any physical condition, no matter how severe, is specific and may only affect 10 or 15 percent of the tasks involved in most job categories. And physical disabilities need not effect the individual's ability to stand stress and deal extensively with individuals, both of which are key elements in most high paying job categories. Mental and emotional disabilities on the other hand are very general in character and may reduce one's capacity to perform under stress and in situations requiring extensive interaction with other people.

Our final data set although much less comprehensive does present some direct information on the effect of discrimination. It was obtained in a study of the employment problems encountered by disabled Vietnam era veterans. Information on employment status, earnings, experience with employers, etc., was collected on about 8,000 disabled veterans selected from the VA's Disability Record files. The typical disabled veteran in the sample had been out of the service for four years and was about 31-32 years old at the time of the survey. Detailed information on type and severity of disability were available from VA files so that all the material could be cross-tabulated by these variables.

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*Another factor here is that the VA is probably more concerned that the relative amounts received by different veterans corresponds to the relative severity of their disabilities, than they are about the match between earnings capacity loss and benefit amount.

**It is important to note that disabled veterans as a group have much stronger pecuniary work incentives than do disabled workers who are covered by other large federal disability programs. Disabled veterans, unlike beneficiaries under OASDI, do not stand to lose any of their disability benefits by working. Thus their participation and earnings performance may overstate what to expect from severely disabled non-veteran groups.

TABLE 5-A

RATING SCHEDULE EARNINGS LOSS FACTORS AND ACTUAL EARNINGS DIFFERENTIALS BETWEEN DISABLED VETERANS AND A CONTROL GROUP, BY SELECTED TYPES OF SEVERE DISABILITY CONDITIONS: SURVEY DONE IN 1969 AND EARNINGS ARE FOR 1967

Type of disability	(1) Rating schedule earnings loss factor (%)	(2) Observed earnings differentials: Earnings of control group ($)	(3) Observed earnings differentials: Earnings of Vets with disability ($)	(4) Observed earnings differentials: Percentage differential $\frac{(2)-(3)}{2} \times 100$
Physical and highly visible:				
Amputation: upper thigh	80.0	7,500	6,000	20.0%
Amputation: leg	60.0	7,404	5,975	19.3
Amputation: hand	90.0	7,517	5,540	26.3
Blindness - both eyes	100.0	7,403	1,177	84.1
90% blindness - both eyes	90.0	7,007	1,408	79.9
80% blindness - both eyes	70.0	7,209	3,518	51.2
Polio - 100% disabling	100.0	9,012	4,713	47.7
Polio - 60% disabling	60.0	9,041	7,287	19.4
Paralysis - both upper and lower - 90%	90.0	7,580	5,230	31.0
Paralysis - both upper and lower - 60%	60.0	7,195	5,612	22.0
Mental-Psychoneurotic:				
Anxiety state - 50%	50.0	7,045	3,945	44.0
Anxiety reaction - 70%	70.0	7,017	1,122	84.0
Anxiety reaction - 50%	50.0	6,984	1,676	76.0
Psychoneurotic reaction - 70%	70.0	7,166	1,218	83.0
Psychoneurotic reaction - 50%	50.0	7,222	2,022	72.0

Source: "Economic Validation of the Rating Schedule" Appendix in Veterans' Administration Proposed Revision of Schedule for Rating Disabilities -- Submitted to Committee on Veterans' Affairs United States Senate (U.S. Govt. Printing Office, Washington 1973).

Tables 6-A - 10-A contain some relevant findings from this survey. The data in tables 6-A and 7-A, although for a very different group, show the same patterns of labor force participation by age and severity of disability that we observed in the 1970 Census Data.*

TABLE 6-A

EMPLOYMENT AND LABOR FORCE STATUS FOR A SAMPLE OF DISABLED VIETNAM ERA VETERANS

Status	Percent
Currently employed	74.3
Looking for work	9.5
In school	7.8
No longer looking or never looked for work	8.3
(n = 7,728)	100.0

Source: Wilson, Richards and Bercini, Disabled Veterans of the Vietnam Era: Employment Problems and Prospects, HumRRO Technical Report 75-1, HumRRO Eastern Division, Alexandria, Va., Jan. 1975, p.26, Table III-1

Tables 9-A and 10-A contain some direct evidence on the effects of discrimination. Twenty-nine percent of those who had looked for work at some time since leaving the service reported at least one experience of discrimination. However, as table 10-A shows, holding constant severity level, the percentage who perceived discrimination varies sharply with the level of education. This fact combined with the striking difference by education level in the effects of disability on labor force activity (table 8-A), suggests that some of the instances of perceived discrimination may have occurred in situations in which the disabled veteran's productivity (even with reasonable accommodations) was lower than that of a non-disabled worker. The levels of perceived discrimination for the college graduate group are probably the most reliable since severity level has very little effect on employment opportunities for them.

It is difficult to translate the incidence of perceived discrimination into an overall average earnings differential. However, since so many veterans did not perceive discrimination, it is likely that some of the aggregative earnings differential by disability status (as in tables 2-A and 5-A) is not due to discrimination. However, the portion due to

*Note however that the labor force participation rate of young severely disabled veterans is still relatively high. This probably reflects in part the differential pecuniary work incentives confronting disabled veterans mentioned above.

discrimination (including the lack of making reasonable accommodations) could still be close to 100 percent. Many veterans may not have perceived discrimination in situations where the employer was not making some minor accommodation for his disabling condition.

TABLE 7-A

PERCENT NO LONGER LOOKING OR NEVER LOOKED FOR WORK BY AGE AND SEVERITY OF DISABILITY

	Severity of disability		
Age	Slight	Moderate	Severe
Under 30	2.5%	7.5	20.0
30-44	1.5	4.5	36.0
45 or over	13.0	15.0	53.0

Source: Same as table 6-A, p.32, table III-3, obtained by combining the percentages shown for "no longer looking for work since leaving service."

TABLE 8-A

PERCENT NO LONGER WORKING OR NEVER LOOKED FOR WORK BY EDUCATION AND SEVERITY OF DISABILITY, VETERANS UNDER 30 YEARS OF AGE

	Severity of disability		
Education level	Mild	Moderate	Severe
H.S. dropout	5.8	15.0	35.0
H.S. graduate	3.5	7.0	25.0
Attended college	1.5	6.5	12.0
College graduate	3.0	2.0	4.0

Source: Same as table 6-A, p.54. table III-24. Obtained by combining the percentages shown for "no longer looking for work" and "haven't looked for work since leaving service."

TABLE 9-A

PERCENT OF VETERANS WHO EVER LOOKED FOR WORK WHO THOUGHT SOME EMPLOYERS DISCRIMINATED AGAINST THEM, BY AGE AND SEVERITY OF DISABILITY

Age	Severity of disability		
	Mild	Moderate	Severe
< 30	22%	38	49
30-44	20	37	59
45+	16	11	46

Source: Same as table 6-A, p.214, table A-V-1.

TABLE 10-A

PERCENT OF VETERANS WHO EVER LOOKED FOR WORK WHO THOUGHT SOME EMPLOYERS DISCRIMINATED AGAINST THEM, BY EDUCATION AND SEVERITY OF DISABILITY: VETERANS UNDER 30 YEARS OF AGE

Education level	Severity of disability		
	Mild	Moderate	Severe
H.S. dropout	30.0%	48	60
H.S. graduate	23	40	48
Attended college	23	36	52
College graduate	12	19	25

Source: Same as table 6-A, p.215, table A-V-2.

APPENDIX B

COMPENDIUM OF STATE LAWS RELATING TO SPECIAL EDUCATION

STATE STATUTORY RESPONSIBILITIES FOR THE EDUCATION OF HANDICAPPED CHILDREN

July 1, 1975

This chart was prepared by The Development and Evaluation of State and Local Special Education Administrative Policy Manuals Project of the State-Federal Information Clearinghouse for Exceptional Children of the Council for Exceptional Children

STATE	TYPE OF MANDATION	DATE OF PASSAGE	COMPLIANCE DATE	AGES OF ELIGIBILITY	CATEGORIES EXCLUDED
Alabama	Full Planning and Programming	1971	1977	6-21	Profoundly Retarded
Alaska	Full Program	1974		From age 3	
Arizona	Selective Planning and Programming	1973	9/76	3-21	Emotionally Handicapped
Arkansas	Full Planning and Programming[1]	1973	9/79	6-21	
California	Selective			6-18[2]	"Educationally Handicapped" (Emotionally Disturbed, Learning Disabled)
Colorado	Full Planning and Programming	1973	7/75	3-21	
Connecticut	Full Planning and Programming	1966		4-21[3]	
Delaware	Full Program "Wherever Possible"			4-21	Severely Mentally or Physically Handicapped
District of Columbia	No Statute. Court Order: Full Program	1972	1972	From age 6	
Florida	Full Program		1973[4]	3-no maximum (13 yrs. guaranteed)	
Georgia	Full Planning and Programming	1968	9/75	3-20	
Hawaii	Full Program	1949		5-20	
Idaho	Full Program[5]	1972[5]		Birth-21	
Illinois	Full Program	1965	7/69	3-21[6]	
Indiana	Full Planning and Programming	1969	1973	6-18[7]	
Iowa	Full Program "If Reasonably Possible"[8]	1974		Birth-21	
Kansas	Full Planning and Programming	1974	1979[9]	Developmentally Disabled: Birth-21	
Kentucky	Planning and Programming	1970	1974	9	Other than TMR
	(Petition for Trainable Mentally Retarded only)	1962		6-21	
Louisiana	Court Order – Orleans Parish only. Selective for Mentally Retarded. Otherwise, Mandatory	1972	1972	3-21[10]	Other than Mentally Retarded
Maine	Full Planning and Programming	1973	1975[11]	5-20	
Maryland	Full Planning and Programming	1973	1979[12]	[13]	
Massachusetts	Full Planning and Programming	1972		3-21	
Michigan	Full Planning and Programming	1971	9/73	Birth-25	
Minnesota	Full Program	7/72[14]	[14]	4-21, except MR (5-21) and ED (6-21)	
Mississippi	Permissive			Birth-21	
Missouri	Full Planning and Programming	1973		5-21	
Montana	Full Program[15]	1974	7/79	6-21	
Nebraska	Full Planning and Programming	1973	10/76[16]	5-18	
Nevada	Full Program	1973		5-18[17]	
New Hampshire	Full Program			Birth-21	
New Jersey	Full Program	1954[18]		5-20	
New Mexico	Full Planning and Programming	1972	9/76	6-21[19]	
New York	Full Program	1973	1973	5-21	Profoundly Retarded
North Carolina	Full Planning	1974	[20]	Birth-Adulthood[21]	
North Dakota	Full Planning and Programming	1973	7/80[22]	5-21[3]	
Ohio	Permissive			Birth-21	Other than crippled or Educable Mentally Retarded, Deaf, Blind, Partial hearing or visually
	Selective Planning	1972	1973	[23]	Trainable or Profoundly Mentally Retarded
Oklahoma	Full Program	1971	9/70	4-21[24]	
Oregon	Full Program	1973		EMR: 6-21 Others: Birth-21	
Pennsylvania	Court Order: Selective (Mentally Retarded Only)	1972	9/72	6-21[25]	Other than mentally retarded
	Full Planning and Programming	1956	1956	6-21	
Rhode Island	Full Program		1964[26]	3-21[26]	
South Carolina	Full Planning and Programming	1972	1977	6-21[27]	
South Dakota	Full Program	1972		Birth-21	
Tennessee	Full Planning and Programming	1972	9/74[3]	4-21	
Texas	Full Program[28]	1969	9/76[28]	3-21	
Utah	Full Program	1969		5-21	
Vermont	Full Program[29]	1972		Birth-21	
Virginia	Full Planning	1972	[30]	2-21	
Washington	Full Program	1971		6-21[31]	
West Virginia	Full Program	1974	1974	5-23[32]	
Wisconsin	Full Planning and Programming	1973	8/74	3-21	
Wyoming	Full Program	1969		6-21	

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[1] Current statute is conditional: 5 or more similarly handicapped children in district. However, a 1973 Attorney General's opinion stated that the law mandating full planning and programming was effective July, 1973.. If the state activates a kindergarten program for 5-year-old children, ages of eligibility will be 5-21.
[2] Permissive for children 3-21, except MR: 5 yrs. 8 mos.-21.
[3] 3-21 for hearing impaired. Lower figure applies to age of child as of Jan. 1 of the school year.
[4] 1973 law did not include profoundly retarded; however, a 1974 amendment brought these children under the provisions of the mandatory law. Compliance date for full services to these children is mandated for 1977-78.
[5] Earlier (1963) law was mandatory for all handicapped children except Trainable Mentally Retarded.
[6] 5-21 for speech defective.
[7] Permissive 3-5 and 19-21.
[8] "Developmentally Disabled" means retardation, cerebral palsy or epilepsy. For other disabilities, the state board is to determine ages of eligibility as part of the state plan. Compliance date is 7/1/74 for DD programs.
[9] Permissive: 3-6.
[10] Residents over age 21 who were not provided educational services as children must also be given education and training opportunities.
[11] In cases of significant hardship the commissioner of education may waive enforcement until 1977.
[12] Court order sets deadline in Sept., 1975.
[13] Services must begin as soon as the child can benefit from them, whether or not he is of school age.
[14] Date on which Trainable Mentally Retarded were included under the previously existing mandatory law.
[15] Statute now in effect is selective and conditional: at least 10 Educable Mentally Retarded, 7 Trainable Mentally Retarded, or 10 physically handicapped in school district. *Full* mandation becomes effective 7/1/79.
[16] Acoustically handicapped: 10/1/74.
[17] Aurally handicapped and visually handicapped: birth-18.
[18] Date of original mandatory law, which has since been amended to include all children.
[19] Child must be 6 years old by Jan. 1 of school year.
[20] Implementation date to be specified in preliminary state plan to be submitted to 1975 General Assembly.
[21] Deaf: to age 18 -or to age 21 "if need exists."
[22] All children must be served as soon as they are identified as handicapped.
[23] Deaf children to be served at age four.
[24] 3-21 for blind, partially blind, deaf, hard of hearing.
[25] When programs are provided for pre-school age children they must also be provided for mentally handicapped children of the same age.
[26] For mentally retarded or multiply handicapped. Others, as defined in regulations. Compliance date established by regulations.
[27] 4-21 for hearing handicapped.
[28] The Texas Educational Agency is operating under the assumption that the law is mandatory, and has requested an opinion from the state Attorney General on this question. Compliance date is as established by state policy if the law does not specify a compliance date.
[29] Within the limits of available funds and personnel.
[30] 9/1/76 established by regulations.
[31] Permissive below 6 years.
[32] Permissive 3-6.

Definition of the kinds of mandatory legislation used by states:

Full Program Mandate: Such laws require that programs must be provided where children meet the criteria defining the exceptionality.

Planning and Programming Mandate: This form includes required planning prior to required programming.

Planning Mandate: This kind of law mandates only a requirement for planning.

Conditional Mandate: This kind of law requires that certain conditions must be met in or by the local education district before mandation takes effect (this usually means that a certain number of children with like handicaps must reside in a district before the district is obliged to provide for them)

Mandate by Petition: This kind of law places the burden of responsibility for program development on the community in terms of parents and interested agencies who may petition school districts to provide programs.

Selective Mandate: In this case, not all disabilities are treated equally. Education is provided (mandated) for some, but not all categories of disabilities.

The work performed herein was done pursuant to a grant from the Bureau of Education for the Handicapped, US Office of Education, Department of Health, Education, and Welfare. The opinions expressed herein, however, do not necessarily reflect the position or policy of the US Office of Education, and no official endorsement by the US Office of Education should be inferred.

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[FR Doc.76-14326 Filed 5-14-76;8:45 am]